

IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

MARIE J. FONTANA,

Plaintiff,

vs.

PHILIP MORRIS INCORPORATED,
("PHILIP MORRIS U.S.A."), R.J.
REYNOLDS TOBACCO COMPANY,
LORILLARD TOBACCO CO., and BROWN
& WILLIAMSON TOBACCO CORP.,
Individually and as Successor to the
AMERICAN TOBACCO COMPANY,

Defendants.

COPY

CASE NO. 00-01731 CA01

TRIAL

Volume 14

TRANSCRIPT OF PROCEEDINGS

in the above-styled cause before the Honorable Thomas S. Wilson, Jr., Circuit Judge, at the Dade County Courthouse, 73 W. Flagler Street, Miami, Florida, on Tuesday, March 27, 2001 at 1:45 p.m.

Miami, Florida

Taylor, Jonovic, White & Gendron

(305) 358-9047

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DOUGLAS McCARRON, ESQ.

6 and

7 GROVER, WEINSTEIN & TROP

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8 BY: MARVIN WEINSTEIN, ESQ.

and

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BY: PHILIP M. GERSON, ESQ.

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1 On behalf of Defendants Philip Morris and
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BY: ANTHONY N. UPSHAW, ESQ.
9

10
11
12 I N D E X

13 MARIE ELLEN MCMILLAN

14 Direct Examination By Mr. Gerson 1605

15
16 Videotape Testimony of:

17 DAVID M. BURNS, M.D. 1614
18
19

20 PLAINTIFF EXHIBITS

21 Plaintiff's Exhibit 12 in evidence 1665
22 Plaintiff's Exhibit 13 in evidence 1667
Plaintiff's Exhibit 11 in evidence 1667
23
24
25

1 (THEREUPON, the following proceedings were
2 held:)

3 MR. ENGRAM: We sent a disclosure out this
4 morning for Michael Ogden and Chris Teaf, and
5 in addition to the records disclosed in our
6 letter of March 27th, we'd like to add for
7 Dr. Ogden and Dr. Teaf the plaintiff's
8 Metropolitan Life Insurance Company records.

9 There's one record that was illegible in
10 that group and we're getting a more legible
11 copy delivered to us, but they're Bates
12 numbered 1016298, Pages 1 through 18.

13 Then we'll also go ahead and disclose
14 possibly for Thursday afternoon Dr. Michael
15 Berry, MD, and the only records that we would
16 use for Dr. Berry would be medical records.

17 MR. CHUMBLEY: Employment records.

18 MR. ENGRAM: Flight logs. We'll add
19 employment records.

20 THE COURT: Mr. Hunter, how much more do
21 we have to go in your case?

22 MR. HUNTER: We have one live witness, who
23 will be about -- Phil is going to do her, and I
24 think she's going to be about a half hour,
25 maybe 40 minutes.

1 And then we have Dr. Burns' videotape,
2 which is about an hour, and then the plaintiffs
3 will rest.

4 We will offer some more evidence in, some
5 documentary evidence.

6 THE COURT: We can do that all after we
7 send the jury home?

8 MR. HUNTER: Yes.

9 MR. REILLY: Well, we're supposed to get
10 exhibits. I presume exhibits is included in
11 that. Can we just know what it is?

12 MR. HUNTER: The Surgeon General's
13 Reports, what is contained in the constituents
14 of smoke, mortality tables, and all of the
15 X-rays.

16 THE COURT: Are you going to read the
17 mortality tables to the jury?

18 MR. HUNTER: Yes.

19 THE COURT: I put the mortality tables
20 into evidence, and I'll allow you to read it.

21 MR. HUNTER: Okay.

22 THE COURT: Because they like to look at
23 it and compare it.

24 MR. REILLY: Is that it?

25 MR. HUNTER: We have that here. Here it

1 is.

2 MR. REILLY: Is that it?

3 THE COURT: She's 59; is that right?

4 MR. HUNTER: Yes, sir.

5 THE COURT: So it would be

6 African-American, female, 59 years of age.

7 We'll highlight that, or you highlight it for
8 us.

9 MR. MCCARRON: Actually, Judge, she's not
10 African-American.

11 THE COURT: What is she?

12 MR. MCCARRON: She's Haitian.

13 THE COURT: Haitian-American.

14 MR. MCCARRON: Just clarifying it.

15 THE COURT: But, I mean --

16 MR. MCCARRON: I know what you're saying.

17 THE COURT: Under those documents, she
18 would come in under an African-American.

19 THE CLERK: 58 or 59? I'm sorry.

20 MR. MCCARRON: She just turned 59.

21 MR. GERAGHTY: And we're also disclosing
22 Dr. Ingram, and we may use any medical
23 records --

24 MR. REILLY: I knew we'd finally get to
25 something. Plaintiff's counsel indicates that

1 they're going to offer cigarette packages, and,
2 of course, I don't know what they're going to
3 offer them for, but once we get to that point,
4 we need to be able to make a record and make
5 our objections, which you need to have an
6 opportunity to rule on.

7 THE COURT: Are you planning to -- can we
8 do this outside the jury's presence?

9 MR. GERSON: Yes, sir.

10 THE COURT: Okay. Then let's hold that
11 off until then.

12 Mr. Upshaw, is this going to be -- I don't
13 know who this witness is going to be.

14 MR. UPSHAW: You're reading my mind there,
15 Judge. Who is this witness and what are they
16 going to testify about? That's what I want to
17 know. See if I have a motion.

18 THE COURT: Because the last two times
19 they've actually come up with some new
20 material.

21 MR. UPSHAW: That's why I need to know who
22 it is. Is it Marie McMillan?

23 MR. HUNTER: Marie McMillan.

24 MR. UPSHAW: My understanding is that Ms.
25 McMillan is a fact witness. I understand she

1 is not a flight attendant. I believe that
2 Ms. Fontana spoke of Ms. McMillan during her
3 direct examination.

4 THE COURT: Yes, she did.

5 MR. UPSHAW: I think she's a nurse.

6 Now, my objection to her, and I don't know
7 whether they're going to offer her, obviously
8 she's not a medical doctor or treating expert,
9 so she can't offer any nonmedical opinion,
10 which is why I filed my motion about nonexperts
11 giving expert opinions, and that was our motion
12 in limine.

13 THE COURT: Okay. Is there any problems
14 we have, or are we facing any problems?

15 MR. HUNTER: I don't believe so, Judge.
16 The only thing is I know that Mr. Gerson is in
17 charge of this witness, and he's presently at a
18 hearing in front of Judge Bailey that started
19 at 1:30, and he felt he would be here.

20 THE COURT: We'll wait for him.

21 MR. HUNTER: All right.

22 MR. WEINSTEIN: Judge --

23 THE COURT: Tell the jurors that there is
24 a delay because one of the attorneys had to be
25 in front of another judge.

1 THE BAILIFF: Yes, sir.

2 THE COURT: And he'll be here immediately.

3 MR. WEINSTEIN: Judge, since we are
4 waiting for Mr. Gerson to come here, I think
5 this might be an opportune moment for me to
6 present to you a matter, a very important
7 matter, Judge, regarding prior and subsequent
8 incidents, accidents, injuries of others who
9 are suffering under the same -- under a
10 respiratory problem as a result of the
11 conditions in the air cabins.

12 As you know, I started on this argument
13 back last week sometime, and Your Honor said, I
14 believe, something to the effect, "I know where
15 you're going, but we'll put this off. Do you
16 want to move on?" and you said, "Give me the
17 packet of cases," and I hadn't gone through the
18 cases yet, but it's extraordinarily important,
19 this issue.

20 THE COURT: Go right ahead.

21 MR. WEINSTEIN: Let me just say this to
22 you, Judge.

23 I have approximately nine cases that I
24 thought were on point in this issue. I
25 presented really the heart of it. I don't know

1 how many cases I handed up to you, but
2 certainly included in there was the original
3 Chambers case and the Hobart case, in which --
4 you know, the meat grinder case.

5 THE COURT: Right.

6 MR. WEINSTEIN: Now, I respectfully submit
7 to you that Your Honor has to give a charge to
8 this jury and take judicial notice of the
9 fact -- of really two facts. One is that over
10 3,000 other flight attendants are complaining
11 about the ill effects of secondhand smoke.

12 Judge, in the cases that I present to you,
13 they involve, in general, one, two or four
14 incidents of prior or subsequent injuries
15 sustained as a result of dangerous conditions.

16 Those cases stand for the proposition
17 that, well, as far back as the Chambers case,
18 which is 1953 when the Supreme Court ruled that
19 evidence of prior or subsequent, similar
20 accidents at or near the time and place are
21 admissible for purposes of showing the
22 dangerous character of the place, and then it
23 says, "and notice thereof." In other words,
24 for two reasons: dangerous character and
25 notice.

1 Of course, notice is irrelevant in this
2 case. But it certainly goes to dangerous
3 character.

4 Indeed, Judge, in this case, they're
5 claiming that there was -- that the cabin
6 environment was such that it couldn't hurt
7 anybody.

8 Well, you know, we have all these cases.
9 We have automobile accident cases in which --
10 in which they allow -- the court, it sustained
11 the judge, in allowing in evidence where an
12 accident -- a car accident occurs, one or two
13 or three car accidents occurred at the same
14 location, or a similar railroad crossing or
15 whatever, to show that a dangerous circumstance
16 existed, and of course, and notice.

17 Judge, if they allow even one prior
18 accident or one prior injury, indeed, it's even
19 more important to tell this jury that over
20 3,000 people have been suffering from the same
21 incident.

22 Now, Judge, as you know, under the -- and
23 I'm going to hand this to you, Judge, and it is
24 the plaintiff's notice -- I've given our
25 opponents a copy. It's the plaintiff's notice

1 of intent to request judicial notice, and we
2 ask that the Court refer to, of course, the
3 same statute that opposing counsel alluded to,
4 90.202, which says that the Court may take
5 judicial notice of the following matters. The
6 relevant matters are this: Records of any
7 court of this state, or any court of record in
8 the United States.

9 Now, you know, Judge, we have 3,200 cases
10 in this court's record, in this case, and you
11 may take judicial notice of, and Subsection 6
12 and Subsection 12, says: Facts that are not
13 subject to dispute because they are capable of
14 accurate and ready determination by resort to
15 sources whose accuracy cannot be questioned.

16 Judge, even in their own motion, they
17 objected to our attendants testifying on the
18 basis -- as to the fog that existed, the fog of
19 smoke that existed up in the air. What was
20 their -- what was their primary objection?
21 It's cumulative, it's cumulative, it's
22 cumulative.

23 Judge, as Phil Gerson said, if you have
24 ten witnesses to an accident, fact witnesses to
25 an accident, you can't exclude them. If the

1 defendant -- it would be nice to say, "Hey,
2 we're only -- we have only one fact witness or
3 expert to say the accident happened this way
4 and this is what the injuries were," and you've
5 got 12 -- 10 witnesses. You can't exclude the
6 12 witnesses to come in, because it goes --
7 they're subject to cross examination; it's
8 subject to whatever.

9 But, nevertheless, you can't exclude them
10 as to fact witnesses. Well, here we have 3,200
11 people who filed complaints because of the
12 adverse effects of secondhand smoke.

13 I respectfully request the Court to tell
14 this jury that approximately 3,000 other flight
15 attendants have filed claims for illnesses
16 arising out of their exposure to environmental
17 tobacco smoke as flight attendants in airline
18 cabins, and I refer the Court to their own
19 statement: So, therefore, it is not subject to
20 dispute.

21 And I further ask you, Judge, in this, to
22 tell the jurors that there are at least 3,000
23 other flight attendants who would testify
24 substantially the same as the flight attendants
25 who have already testified, concerning the

1 tobacco smoke conditions in commercial airline
2 cabins at times generally relevant in this
3 case. These other flight attendants will not
4 testify, only because their testimony would be
5 cumulative and consume a great deal of time
6 regarding matters already testified to.

7 Now, Judge, let me give you exactly what I
8 was reading from, and it's my notice of intent
9 to rely.

10 Now, I believe, Judge, I respectfully
11 submit that these jurors should know,
12 especially faced with their defense, that,
13 look, this can't cause injury to anybody; it
14 was so diluted, all right, how could anybody be
15 hurt by it? And, you know, I could see them
16 coming down in their final argument and saying:
17 How come a lot of other people aren't hurt?
18 What we have are seven people who have their
19 own claims, who have testified here.

20 Well, Judge, these jurors are entitled to
21 know -- and I have to tell you, Judge, I really
22 believe that from the beginning of this case,
23 and you know you get 100 lawyers, they give you
24 100 different things that they think, different
25 opinions, I think from the very onset we should

1 have told the jurors that Ms. Fontana is here
2 as one of a certain group of people who are
3 suffering from the same ill effects as a result
4 of a class action; she's entitled to come in
5 here and prove she was specifically injured by
6 this, and I think that's the best way to really
7 handle it from the very beginning.

8 Now, Judge, evidence of other accidents
9 involving the -- you know, we're dealing with a
10 product here, Judge. This is basically a claim
11 arising out of a defective product; that is,
12 tobacco. It is well-known, Judge, that if you
13 are bringing a product liability case, Judge,
14 and you wanted to prove that, for example, a
15 meat grinder or a car is defective, you're able
16 to show other accidents that occurred or other
17 people who were injured, such as people putting
18 their -- their hands in there.

19 Now, Judge, in Chambers v. Loftin, Supreme
20 Court, 1953, 62 So.2d 220, that involved a saw,
21 and the Supreme Court clearly stated that the
22 plaintiff made a proffer of evidence as to
23 other accidents that had occurred in the -- on
24 the saw in question, prior to the injury.

25 It is well-settled that evidence of prior,

1 or subsequent, similar injury to the -- to the
2 plaintiff -- similar accidents, are admissible
3 if they are not too remote in time for purposes
4 of showing the dangerous character of the
5 place, the defendant's knowledge thereof.

6 Now, Judge, I am going to ask you -- I
7 don't care when you give it, but I believe it
8 should be given, I hope, at the time that you
9 make those two statements. I ask for this
10 special jury instruction. I have law to
11 support this right on point.

12 Indeed, and that is, when you take
13 judicial notice of the other 3,000 claims that
14 are pending and tell the jury that, and that
15 they're not being called to save time, but they
16 are claiming -- they are claiming the same type
17 of similar injuries, you should also tell them
18 this.

19 You should give them an instruction, and
20 it's best really at the time you take judicial
21 notice and tell the jury that that you're
22 taking judicial notice of it: I instruct you
23 that you may consider evidence of claims
24 involving secondhand tobacco smoke
25 related-illnesses by other flight attendants

1 who were subjected to the same or similar
2 conditions. You may consider this evidence in
3 determining the actual smoking conditions that
4 existed in the airline cabins in determining
5 the dangerous character of secondhand tobacco
6 smoke to cause or aggravate or accelerate any
7 illness.

8 Now, the primary citation I make on that
9 is Rodriguez versus Loxahatchee, 636 So.2d
10 1348. That's a Fourth DCA case.

11 Now, Judge, all of the cases, the package
12 I handed you are all Third District and Supreme
13 Court cases, except for the Rodriguez case.

14 Now, I took a little issue with
15 Mr. Upshaw. He's smiling over there, because
16 he came up before you and he said: Judge, I
17 want to call to your attention Rodriguez versus
18 Loxahatchee. Of course, Mr. Weinstein didn't
19 give you case that.

20 Judge take a look at your package. I did,
21 indeed, give you that case and gave Mr. Upshaw
22 the opportunity -- I came up to him and I said,
23 "I think it would be nice if you went up to the
24 Judge and say you made a little error, because
25 you said to the Judge" -- I prefer not to bring

1 it out myself. I've been doing too much stone
2 throwing at these fellows.

3 So he opted not to come up and apologize
4 for misrepresenting that.

5 But if you'll check your package, you'll
6 see I did give you Rodriguez versus
7 Loxahatchee. Why? That's a very important
8 case, because in Rodriguez, Your Honor, the
9 Judge did give an instruction on exactly --
10 it's the only case in the package that talks
11 about how the judge should instruct, and in
12 Rodriguez -- incidentally, Judge, Rodriguez is
13 a '94 case, and it's really a causation and
14 dangerous condition case, in a way.

15 It involved two other car accidents
16 that -- these cars went into a canal. The
17 judge let in the instruction -- let in the
18 information to the jury that two other car
19 accidents happened there.

20 And they said -- and they said here that,
21 in the case on Page 1349 of that case, it said
22 that: The trial court gave the following jury
23 instruction, and they held it wasn't error.
24 They held he was right.

25 The Judge actually told this to the jury,

1 Judge, and I'm reading: Evidence of other
2 accidents may not be -- may not be considered
3 as proof of negligence, but they may be
4 considered as proof of the defendant's
5 knowledge of a dangerous condition when the
6 evidence demonstrates that other accidents
7 occurred under the same and similar
8 circumstances, and causes to the accident in
9 dispute. Such accidents must have occurred
10 under the same or similar circumstances.

11 In other words, he's giving the same and
12 similar-circumstance charge to the jury. And
13 then he says this in his instruction that was
14 upheld: The evidence of similar accidents must
15 have a tendency to -- a tendency to establish a
16 dangerous or defective condition at the place
17 in question and must not be too remote in time
18 to the accident or condition.

19 And then the case goes on to say that: It
20 is well-settled in Florida that sufficient
21 similar other accident evidence, not too
22 remote in time, is relevant and admissible to
23 show the existence of a dangerous condition,
24 and knowledge.

25 Now, so, therefore, in this case, Judge,

1 we respectfully request now that you give --
2 that you take judicial notice of an undisputed
3 fact, that there are over 3,000 claims pending
4 by airline attendants under the same
5 circumstances.

6 I ask, additionally, because they say it's
7 cumulative, that you tell them that 3,000 other
8 people would come in here and testify to
9 substantially the same thing; indeed, they
10 concede that by saying, Judge, please prevent
11 them from calling all of these people. It's
12 cumulative.

13 Judge, I cite to you Hobart. I cited to
14 you previously the Hobart versus Siegel case.
15 It's a Third District case, '92. That's the
16 meat grinder case.

17 Three other claims of a food grinder. And
18 what do they say in this case, Judge? This is
19 extremely important. They say: Although three
20 children were called to testify about their
21 hands being put into this meat grinder, they
22 say: We agree that it would have been
23 preferable to proffer the complaints filed in
24 the lawsuit.

25 In other words, Judge, they're saying, you

1 should -- it would have been preferable, rather
2 than -- and, you know, you have to know the
3 background of the case. As I mentioned the
4 other day, they had three people who raised
5 their hands and didn't have a hand.

6 So they said it would have been preferable
7 to take those three complaints that were filed
8 and present them to prove that there are other
9 claims under the same or similar situations,
10 same circumstances.

11 In Saunders versus Florida Keys, 471 So.2d
12 88, that case involved basically the same
13 thing. Similar accidents involving an electric
14 company's power lines in other marinas was
15 relevant. In other words, a similar accident
16 occurred, although an accident occurred, even
17 though in different locations with certain --

18 THE COURT: What is the cite on that case?

19 MR. WEINSTEIN: 471 -- I'll give you a
20 copy of all of these.

21 THE COURT: No. I thought it sounded
22 familiar. I had a power line case.

23 MR. WEINSTEIN: Well, it's 471 So.2d 88.
24 It's a Third District case, 1985.

25 And they said that evidence of a similar

1 incident at the location, other than the place
2 where the incident occurred, is relevant for
3 purposes of showing the existence of a danger
4 with their power lines, or defect, and notice,
5 knowledge, et cetera.

6 Again, Judge, that involves three -- they
7 said it was admissible to put in that three
8 other accidents occurred with power lines of a
9 similar situation.

10 So far we have -- in one -- in Hobart,
11 three other accidents was admissible, to show
12 the dangerous condition; in Saunders, three
13 accidents on power lines admissible.

14 Very interesting case, Lazar versus
15 Bachanor -- and I have all Third District
16 cases, and the citation is 436 So.2d 236, and
17 they talk about two accidents of a dangerous
18 character of a meat grinder. Boy, these meat
19 grinders are doing a lot of things to people,
20 apparently. It's a meat grinder case, too.

21 But what's interesting in that case, I
22 found, is in that case they had two witnesses
23 testify and they also put in two other
24 complaints that were filed in court regarding
25 the same meat grinder, same or similar meat

1 grinder.

2 And it says: Also evidence that the trial
3 court's decision that evidence of prior
4 accidents occurring was substantially similar,
5 and they permitted it. They then go on and
6 say: The trial court properly admitted
7 evidence of prior accidents involving a meat
8 grinder, which was substantially identical to
9 the accident, and properly admitted into
10 evidence two additional complaints filed
11 against manufacturer -- against the
12 manufacturer by two other people injured by the
13 same type of meat grinder.

14 Then, of course, we have the Rodriguez
15 versus Loxahatchee case, and that involved two
16 other car accidents.

17 In Railway Express, 227 So.2d 870, that's
18 a Supreme Court, 1969, evidence on behalf of an
19 employee who was injured while working on a
20 conveyor line would be admissible against an
21 employer in showing substantial similarity.

22 And in that case, they also say -- they
23 refer to Chambers v Loftin, which was the saw
24 case, and they said: It is well-settled that
25 evidence of prior or subsequent, similar

1 accidents at or near the time and place for
2 purpose of showing the dangerous character of
3 the place.

4 And Warn, it's Warn versus Geist, 343
5 So.2d 44, Third District again, 1977, a very
6 interesting case, Judge --

7 THE COURT: Okay. Let me cut you off. We
8 have Mr. Gerson here. He's here.

9 MR. WEINSTEIN: This is the last case.

10 THE COURT: This is the last case?

11 MR. WEINSTEIN: Yes. I would just like to
12 call the Court's attention just to bring it in
13 continuity.

14 THE COURT: Finish it up quick. I want to
15 get this jury in and out. I want to finish the
16 plaintiff's case today. We will have plenty of
17 time to argue this motion. It isn't over.
18 They haven't had a chance to rebut yet.

19 MR. WEINSTEIN: Yes, Judge. I won't
20 finish it. I'll withdraw it. I'll get to the
21 Warn case later on. I say we don't care when
22 this is done, even if it's later on.

23 THE COURT: Todd, bring the panel in.

24 I'm sorry to cut you off, Mr. Weinstein,
25 but I really want to get this jury home as soon

1 as possible today.

2 MR. WEINSTEIN: I understand.

3 MR. UPSHAW: While Mr. Jackson is getting
4 the jury, I know Mr. Gerson wasn't here when we
5 were talking about what the witness is going to
6 testify to. We still don't know. Mr. Hunter
7 said he didn't know.

8 THE BAILIFF: Judge, ready?

9 THE COURT: I think so. Just one second.

10 MR. GERSON: This is a before-and-after
11 witness.

12 THE COURT: Not a flight attendant?

13 MR. GERSON: She's not a flight attendant.

14 THE COURT: Not going to speak about an
15 area of expertise, like what caused -- what's
16 causing her --

17 MR. GERSON: No. And she has nothing at
18 all to say about air quality on airplanes.
19 It's only her dealings with the plaintiff.

20 THE COURT: Okay.

21 MR. UPSHAW: No medical, all that kind of
22 thing?

23 THE COURT: That's what -- I asked him
24 about experts. He said, "No."

25 MR. UPSHAW: Okay.

1 THE COURT: Of course, nurses have a
2 certain expertise. I don't know what that
3 could be. That's going to have to be subject
4 to specific objections.

5 MR. REILLY: Yes, sir. She hasn't been
6 disclosed as a nursing expert of any kind.

7 THE COURT: I would assume. I don't know.

8 MR. UPSHAW: All right. I understand,
9 Judge.

10 THE COURT: Yes. Bring the panel in.
11 Mr. Gerson, I hope you were successful.

12 MR. GERSON: Yes, I was. Thank you.

13 (The jury entered the courtroom.)

14 THE COURT: Make yourselves comfortable.
15 Good afternoon, ladies and gentlemen. I hope
16 everybody had a good lunch.

17 Ma'am, come up and have a seat. Let the
18 record reflect that all our jurors are present
19 and accounted for and we're ready to proceed.

20 As soon as you get seated, I'll swear you
21 in and get you in and out as soon as possible.

22 Thereupon:

23 MARIE ELLEN MCMILLAN
24 been called as a witness, was duly sworn,
25 examined, and testified as follows:

1 THE COURT: Please state your full name,
2 spell your last name for our court reporter,
3 and give us your current address.

4 THE WITNESS: My name is Marie Ellen
5 McMillan, M-C-M-I-L-L-A-N. I reside at

6 [DELETED]

7 THE COURT: Your witness.

8 MR. GERSON: Thank you, Your Honor.

9 DIRECT EXAMINATION

10 BY MR. GERSON

11 Q. Marie, tell us a little bit about the kind
12 of work you do and what your background is.

13 A. I'm a registered nurse, and I've been a
14 nurse for 24 years. The past 18 years I've been
15 employed by the State of Florida with the Department
16 of Health.

17 Prior to that, I worked in several
18 hospital-based positions. My first position out of
19 nursing school was in a neurosurgical intensive care
20 unit, where I dealt with patients with spinal cord
21 injuries and the like.

22 Q. Have you had an experience working in
23 nursing roles and nursing jobs where you were
24 involved with pulmonary medicine?

25 A. Yes, I had. For two years I worked in a

1 community hospital on a medical/surgical thoracic
2 unit, where the vast majority of the patients had
3 pulmonary conditions, such as lung cancer,
4 tuberculosis, chronic obstructive lung diseases.

5 Q. Now, you are a friend of Marie Fontana's?

6 A. Yes, I am.

7 Q. And based on the background that you just
8 gave us, has Marie reached out to you for some
9 support and some help in dealing with the pulmonary
10 medical problems that she has?

11 A. Yes, she has. Absolutely.

12 Q. And have you spent much time talking with
13 her about her condition and educating her and
14 answering her questions?

15 A. Yes, I have. The last few years, in
16 particular, as her condition has deteriorated, she
17 has faced quite a few decisions that she needed to
18 make in terms of her health care, and as a friend
19 and because of my background in nursing, she would
20 frequently ask me questions or ask me my opinions,
21 ask me what I would do if I was faced with the same
22 type of issues that she's been dealing with.

23 Q. And she's testified already and is quite
24 knowledgeable about her condition. Has some of her
25 information at least come from you?

1 A. Some of it. Certainly I've tried to steer
2 her in a direction where she could obtain more
3 information about her illnesses, and I've asked
4 questions of other friends of mine to assist her, as
5 well.

6 Q. Now, Marie has told us that she's been
7 down to Miami to meet with the Jackson Hospital
8 transplant team, and she's been through the first
9 steps of a transplantation process.

10 Did you participate in any of that with
11 her?

12 A. Yes, I did. There was a week of
13 evaluations that she had to go through at Jackson,
14 and I accompanied her -- actually transported her
15 back and forth three of the four or five days that
16 she was going down there.

17 She stayed at my house overnight, and was
18 with her, not during the actual, physical
19 evaluations that she had, like the pulmonary
20 function tests or the echocardiograms, but I sat in
21 with her with the head of the transplant team,
22 Dr. Fertel. I also met with the transplant surgeon
23 with her, the transplant nurse/coordinator and the
24 medical/social worker.

25 Q. And, in fact, as Marie told us yesterday,

1 there is a support group for people awaiting
2 transplants, and she's a member of that group, and
3 she's been attending meetings.

4 Have you had any role or any involvement
5 in that part of the process yourself?

6 A. Again, yes, I have. I transported her and
7 attended the support group meetings with her on
8 three separate occasions since she was accepted into
9 the transplant program at Jackson.

10 Q. Are you officially involved in any way in
11 this process, and if so, tell the members of the
12 jury the part that you have agreed to do.

13 A. Well, Mijo has a living will, and I was
14 one of the witnesses to her living will. And I'm
15 listed as a member -- as a person to contact to be
16 sure that her wishes are known in the event that she
17 cannot convey her wishes to her health care
18 providers.

19 I'm also -- she has a beeper which she
20 carries with her so that the transplant team can
21 contact her at any time. However, if they're unable
22 to reach her through her beeper or at her home, I'm
23 listed as the next person to contact, so that I may
24 try to reach her, as well.

25 In addition, because her daughter lives in

1 New York, and if she gets called for a transplant,
2 unfortunately we were told that sometimes it's --

3 MR. UPSHAW: Objection, Your Honor.
4 Hearsay.

5 THE COURT: Overruled. I don't know what
6 the context is.

7 Go ahead.

8 A. (Continuing) We were told that on
9 occasion, there can be a dry-run, so to speak. You
10 may be called for a transplant, and when you arrive
11 there, and the lungs arrive, they may not be
12 transplantable, so you could be prepped for surgery
13 and actually not go through with the surgery.

14 So, in the event that she got called, we
15 didn't want her daughter to hop on a plane and fly
16 all of the way down without having to be seen at
17 that time, so I'm to contact her daughter in the
18 event that that occurs.

19 Q. So you would be the person to respond
20 first, and then to notify her other family and
21 friends --

22 A. Right.

23 Q. -- that the surgical process of the
24 transplantation had --

25 A. Actually had been done.

1 Q. -- had been done?

2 A. Right.

3 Q. Now, how long have you known Marie
4 Fontana?

5 A. A little over ten years.

6 Q. And what is your association or your
7 relationship with her?

8 A. We're friends. We're very good friends.

9 Q. And what kind of a person is she? How
10 would you describe her or characterize her?

11 A. Well, I guess I could sum Mijo up in two
12 words, both beauty and grace. I think she's
13 probably one of the most beautiful persons I've met,
14 and it sounds kind of trite or simple, but she's
15 both beautiful inside and out, as well.

16 She has so much compassion for other
17 people, and she's totally selfless. You know,
18 during this time when she obviously is very ill and
19 should be more concerned about herself, she's always
20 concerned about everyone else.

21 When I call her on the phone to see how
22 she's doing, usually the first words out of her
23 mouth are, "Well, how are you," or "How are your
24 babies," referring to my pets, and "What's happening
25 with you," and you know, she never -- she tries to

1 focus attention to the person outside of her.

2 She's -- and she surrounds herself with
3 very positive individuals, people who are as
4 positive as she is about life. And considering the
5 deterioration of her health, I think in many ways
6 she's much more alive than most people I know.

7 Q. Does she complain about her situation or
8 her pain?

9 A. On occasion. But very rarely.

10 Q. Do you know whether she's still hopeful
11 about her future?

12 A. I think for the most part, she is. She --
13 she expresses fears about what the potential of
14 having a transplant might be, or fears about not
15 actually receiving a transplant.

16 But I think her -- I think she deals with
17 her situation by trying to remain positive and
18 trying to be hopeful, to be able to survive every
19 day.

20 Q. Based on what she's able to do for herself
21 and what other resources she has available through
22 friends and family locally, are her -- do you know
23 whether her needs are met now?

24 A. With the support that she gets from family
25 and friends, her physical needs or psychological

1 needs?

2 Q. Physical.

3 A. Physical needs. For the most part, I
4 think so, yes.

5 MR. GERSON: That's all of the questions
6 that I have.

7 MR. UPSHAW: Your Honor, we have no
8 questions. Thank you.

9 THE COURT: Thank you very much.

10 THE WITNESS: Thank you.

11 THE COURT: Who is our next witness?

12 MR. HUNTER: Dr. David Burns, by
13 videotape.

14 THE COURT: Okay.

15 MR. MCCARRON: Judge, I think we need to
16 come sidebar with the court reporter.

17 THE COURT: Okay.

18 (The following proceedings were had at
19 sidebar:)

20 MR. MCCARRON: Judge, on Page 7399 of
21 Dr. Burns' testimony and going on to the end of
22 direct, which is 7400, Your Honor reserved as
23 to the last question and answer. And before
24 playing the tape, I wanted to find out --

25 THE COURT: 7399.

1 MR. MCCARRON: Start on Line 2 and then go
2 over to the next page.

3 MR. ENGRAM: Which questions?

4 MR. MCCARRON: Right here.

5 THE COURT: Okay.

6 MR. ENGRAM: Your Honor, I think what we'd
7 done is we had -- we had addressed the issue
8 about the fact that the Environmental
9 Protection Agency Report, which had formed the
10 basis of the opinion of many of these
11 organizations, had since been vacated, and I
12 think that was the concern that Your Honor had,
13 was, you know, whether maybe in 1997, when the
14 statement was made, that might have been an
15 accurate statement, but the landscape has
16 changed, with the vacation of the Environmental
17 Protection Agency Report.

18 THE COURT: Okay. Noting that objection,
19 I'm going to allow this testimony in.

20 MR. GERSON: We have less than two hours
21 on this tape and we have no more witnesses
22 after that.

23 (The sidebar conference was concluded, and
24 the following proceedings were held in open
25 court:)

1 THE COURT: Ladies and gentlemen, while
2 our court reporter gets set up, let me tell you
3 what the schedule is. We should have -- I'm
4 not sure if it's an hour and a half, two hours,
5 this deposition, and there will be a reading of
6 one other bit of evidence to you, which will
7 take about a half a second, and that will be
8 the end of plaintiff's case.

9 So you all will go home early today, and
10 then we'll start tomorrow with the defense
11 case. That's our schedule.

12 (The videotape testimony of David M.
13 Burns, MD, was played to the jury as follows:)

14 Q. Dr. Burns, please state your full name and
15 your present professional address.

16 A. I am David Michael Burns, and I'm
17 professor of medicine at the University of
18 California, San Diego, School of Medicine, 200 West
19 Arbor Drive, San Diego, California, 92103.

20 Q. We've had some Ph.D.'s testify in this
21 case, so I just want to establish that you are an
22 MD?

23 A. Yes, I am.

24 Q. Okay. Let me -- let me take you through
25 initially your education, your medical education, as

1 well.

2 You went to Boston College, and you got a
3 Bachelor of science in biology?

4 A. That's correct.

5 Q. In what year?

6 A. Graduated from Boston College in 1968.

7 Q. And then you attended Dartmouth Medical
8 School?

9 A. That's correct.

10 Q. For how long?

11 A. For two years. I received a Bachelor of
12 medical science for the first two years of medical
13 school at Dartmouth.

14 Q. After completing that curriculum at
15 Dartmouth -- by the way, Dartmouth is located in New
16 Hampshire?

17 A. Yes, sir, it is.

18 Q. In terms of your formal, additional
19 medical education, where did you go from Dartmouth?

20 A. I received my Doctorate in medicine from
21 Harvard, and then I trained in internal medicine at
22 Boston City Hospital on the Harvard Medical Service
23 at Boston City Hospitals.

24 Q. So you got your MD degree at Harvard?

25 A. Yes, I did.

1 Q. Now, the internship, we're now in the
2 early '70s, when you're serving your internship?

3 A. That's correct. I was an intern and
4 resident from 1972 to 1974.

5 Q. And where did you serve your residency?

6 A. I was a resident at Boston City Hospital.

7 Q. You were a resident in what particular
8 specialty?

9 A. In internal medicine.

10 Q. What, broadly defined, what is internal
11 medicine?

12 A. Well, there's sort of three categories of
13 basic types of services. The first is surgical; the
14 second is those nonsurgical treatments of disease
15 processes, which is internal medicine; and then
16 there are diagnostic services, such as radiology or
17 pathology, or some of the other specialty diagnostic
18 services.

19 So internal medicine is really that body
20 of medical practice that specializes in the
21 nonsurgical management of illness, illness like high
22 blood pressure, heart disease, lung disease, kidney
23 disease, et cetera.

24 Q. So in terms of a specialty, like a
25 neurosurgeon, who would be dealing with a more

1 limited area, internal medicine is obviously
2 broader?

3 A. Internal medicine is a very broad
4 specialty, that's correct.

5 Q. Now, what I'm going to do, I'll go down
6 your curriculum vitae and ask you about certain
7 specific things that are listed there and then have
8 you explain.

9 You were a medical officer, National
10 Clearinghouse for Smoking and Health, Bureau of
11 Health, Education, Centers for Disease Control in
12 Atlanta for two years?

13 A. That's correct.

14 Q. So tell us about that, what you were
15 doing, what your function was.

16 A. When I completed my training in internal
17 medicine, I went into the Public Health Service for
18 two years. During the time I was in the Public
19 Health Service, I was at the National Clearinghouse
20 for Smoking and Health, which was the organization
21 in the Public Health Service responsible for tobacco
22 issues.

23 I was the medical staff officer for that
24 group, and I wrote the 1975 Surgeon General's Report
25 as part of my responsibility at that time. I was

1 also responsible for a variety of other tobacco
2 issues, from 1974 through 1976 including the
3 management of one of the national surveys of smoking
4 behavior.

5 Q. Now, you were -- you were a pulmonary
6 Fellow at the University of California Medical
7 Center from 1976 through 1979?

8 A. That's correct.

9 Q. Now, let me -- the jury's heard about --
10 about a residency program, which obviously is what
11 you need to go through before you can specialize in
12 the field of internal medicine.

13 A. That's correct.

14 Q. Now, what is the difference between a
15 fellowship and a residency?

16 A. Well, at the completion of your residency,
17 you are broadly trained to deal with most of the
18 problems that occur in internal medicine. There
19 are, obviously, in each individual organ system,
20 special kinds of problems, difficult problems, more
21 complex issues, and so we have evolved specialists
22 that deal with just those issues; cardiologists, for
23 example, deal with heart attacks and managing
24 hypertension and managing congestive heart failure.

25 In my own case, I took a specialty in

1 pulmonary medicine, which is lung disease, and
2 intensive care medicine. So that is the specialty
3 in diseases of the lung: chronic obstructive lung
4 disease, asthma and a variety of other complications
5 that occur in the lung, as well as the management of
6 patients in intensive care units, which is a very
7 complex area, and it requires one individual to
8 organize information from multiple different
9 systems.

10 In an intensive care unit you may have bad
11 lungs and a bad heart and bad kidneys, and so we
12 need to have one person manage how the treatment of
13 all three of those disease processes is coordinated,
14 and so that becomes a fairly specialized area of
15 practice, as well.

16 Q. In terms of -- in terms of a hospital
17 population, those people who are in the intensive
18 care units, they're the sickest, the most critical
19 people?

20 A. That's correct. They're the people who
21 are in shock. They're the people who are on
22 mechanical ventilation. Those are people who have
23 very severe infections.

24 Q. To this day, are you involved in intensive
25 care, critical care medicine?

1 A. Yes, I am. I completed a month in May, as
2 a matter of fact, in the intensive-care unit.

3 Q. Are you board-certified, Doctor, in any
4 specialty?

5 A. Yes. I'm board-certified in internal
6 medicine. I'm also board-certified in pulmonary
7 medicine, and I have a certificate of special
8 accomplishment in critical care medicine.

9 Q. It's already been explained to the jury
10 what it means to become board-certified, so I won't
11 take you through that.

12 A. Okay.

13 Q. Now, you are the acting medical director
14 of the pulmonary function laboratory at the
15 University of California, San Diego Medical Center.
16 What is -- what is that, and how does it differ from
17 your intensive care duties?

18 A. Actually, I was the acting director for a
19 period of time. I am -- I transferred those
20 responsibilities a number of years ago.

21 The pulmonary function laboratory is that
22 laboratory that measures how well your lungs breathe
23 and makes measurements of blood, concentrations of
24 oxygen in carbon dioxide, particularly from the
25 arterial blood. So we measure how well your lungs

1 are functioning, how big a breath you can take, how
2 fast you can blow the air out, and we also measure
3 whether that oxygen that you inhaled actually gets
4 into the arterial blood and transferred around in
5 the body.

6 So, I was responsible for making sure that
7 that testing was done correctly for interpreting
8 those tests and training the fellows in that
9 laboratory.

10 Q. Now, temporarily I'm going to move to the
11 area of your involvement with Surgeon General's
12 Reports --

13 A. Okay.

14 Q. -- over the years.

15 Now, your very first involvement with any
16 United States Surgeon General's Report was in what
17 year?

18 A. In -- my first involvement was in 1974,
19 when I joined the Public Health Service and I was
20 assigned the task of writing the annual report to
21 the -- of the Surgeon General at that time, and,
22 therefore, I began the process of examining all of
23 the information and writing the draft chapters.

24 So it began in 1974, and it came out --
25 was published in 1975.

1 Q. Were you, in fact -- what was your title
2 with respect to the 1975 Surgeon General's Report,
3 if you had a title?

4 A. Oh, I had -- as most of you know in
5 government, I had a very grand title. I was the
6 medical staff director of the National Clearinghouse
7 for Smoking and Health for that report. It's kind
8 of a shame I didn't have a medical staff, but I was
9 the medical staff director.

10 But, indeed, I was the physician
11 responsible for actually drafting that report and
12 for making sure that its scientific content was
13 correct.

14 Q. And what has been your involvement with
15 the various Surgeon General's Reports over the years
16 since 1975?

17 A. I have been author, editor or reviewer of
18 every single Surgeon General's Report that has been
19 published since 1975, and they are published usually
20 on an annual basis.

21 Q. Let me -- let me ask you to distinguish
22 between the responsibilities of an author, editor
23 and reviewer of a particular Surgeon General's
24 Report.

25 A. All right. Well, in the first experience

1 that I had with Surgeon General's Reports, they were
2 produced by the Public Health Service inhouse; that
3 is, someone who was a public health officer would
4 actually draft the first chapter. That's what I did
5 in 1974 and 1975.

6 Those chapters would then go out to
7 outside experts, people who were scientists
8 throughout the country, and we would ask them to
9 respond and review that information, to tell us
10 whether it was complete, whether it was accurate,
11 whether the conclusions that were drawn were
12 correct.

13 It would then come back, be changed,
14 rewritten and sent back out again as a whole
15 document to another larger group of reviewers and to
16 the entire U.S. Public Health Service as agencies of
17 the U.S. Government.

18 After 1978, that process changed. And
19 what we did was ask experts throughout the country
20 to write either draft sections or, on occasion, an
21 entire draft chapter.

22 Once those experts completed that chapter,
23 they sent it to us, and we never sent it back again.
24 And there were a group of editors who were
25 responsible for examining that to make sure that it

1 was accurate, complete and expressed clearly what
2 was being said scientifically.

3 That chapter was then sent out to a group
4 of expert reviewers, different than the authors, all
5 across the country. Their comments were received by
6 the editors, and the editors made the changes in the
7 document at that time, not the individual authors.
8 We were -- we wanted to be sure that the biases that
9 creep in when you write something yourself were not
10 influencing the content or the conclusions of the
11 report.

12 Having completed each chapter, we then put
13 all of the chapters together as a document, and sent
14 it to a group of senior individuals who had a very
15 broad experience with the tobacco issue, to look at
16 accuracy, balance, tone and consistency of the
17 document, as well as whether the conclusions drawn
18 were supported by the data contained in the
19 document.

20 At the same time, it was sent to each of
21 the agencies of the Public Health Service for formal
22 review of its content for accuracy and completeness.

23 Those comments were again sent back to the
24 editors. The editors again changed the document in
25 response to those comments, and then it was sent

1 officially through the Public Health Service, to the
2 Surgeon General, to the Assistant Secretary for
3 Health, to the Secretary of Health and Human
4 Services or Department of Health, Education and
5 Welfare in the old days, and then it is sent to
6 Congress as part of a requirement by law that these
7 documents be submitted to Congress.

8 At that point, it becomes not only the
9 consensus of the scientific community, but also the
10 official position of the U.S. Public Health Service
11 on the tobacco issues.

12 Q. Now, you were actually the senior
13 scientific editor of the Surgeon General's Reports
14 from 1984 through 1987?

15 A. That's correct.

16 Q. So with respect to the 1986 Surgeon
17 General's Report, which is in evidence, and the
18 title of which is the Health Consequences of
19 Involuntary Smoking, you were the senior scientific
20 editor of this?

21 A. Yes, I was.

22 Q. And, of course, obviously in terms of the
23 acknowledgments, it mentions that.

24 Now, then it goes on to mention -- Roman
25 numeral VIII, in the very beginning, under the

1 heading is acknowledgments.

2 Now, in the same paragraph, where it
3 recreates that you're the senior scientific editor,
4 David M. Burns, it mentions several consulting
5 scientific editors, and then it goes on -- there's a
6 rather lengthy list of doctors who prepared draft
7 chapters, or portions of the report --

8 A. Right.

9 Q. -- and this is the process you were
10 referring to earlier?

11 A. That is the process I was referring to
12 earlier. And then if you go on further, you'll see
13 that there's also a separate list of those
14 individuals from across the country that reviewed
15 the content of either chapters or the entire
16 document.

17 Q. So in that sense, is this a peer-reviewed
18 document?

19 A. It is a very extensive peer-review
20 process, and it has three separate stages to it.
21 The first two are with academic and scientific
22 groups, and the last is a clearinghouse through the
23 U.S. Public Health Service. So it is far more
24 extensively critiqued than is a normal publication
25 in the journal.

1 Q. Now, obviously, Dr. Burns, the 1986
2 Surgeon General's Report, did it deal exclusively
3 with the issue of involuntary smoking, secondhand
4 smoke?

5 A. Yes. After the 1979 report, which dealt
6 with the broad range of issues we produced a report
7 each year which focused on a specific aspect of the
8 damage caused by tobacco. And this year we focused
9 on environmental tobacco smoke exposure, involuntary
10 smoking, secondhand smoke, the exposure of
11 nonsmokers to tobacco smoke in the air.

12 Q. I'm limiting this question now to the
13 Surgeon General's Reports as an overall entity, and
14 I want to find out from you, when was the very first
15 time, in a Surgeon General's Report, that the
16 subject of involuntary smoking, secondhand smoke,
17 was dealt with?

18 A. 1972, and actually antecedent or came
19 before my tour of duty in the Public Health Service.

20 Q. Who was Surgeon General of the United
21 States in 1972?

22 A. I believe it was Dr. Steinfeld, Dr. Jesse
23 Steinfeld.

24 Q. What was the background, if you know, of
25 the subject of involuntary smoking being dealt with

1 as early as 1972?

2 Unidentified Voice: Objection, hearsay.

3 A. Well --

4 The Court: Overruled. Overruled.

5 A. Clearly, we were interested in the health
6 consequences of smoking. Having established the
7 magnitude and the rather enormous magnitude of the
8 disease risks produced by exposure to tobacco smoke,
9 a number of people, most significantly
10 Dr. Steinfeld, in his responsibility as Surgeon
11 General, began to ask the question that, if you have
12 such tremendous amount of disease from this
13 high-dose exposure, will a lower dose exposure also
14 cause disease? Will you get less disease but still
15 more than should be accepted for purposes of public
16 health?

17 And he asked that question and raised the
18 issue by most of the methods that we would use to
19 deal with an occupational exposure, asbestos, or
20 some of the other kinds of exposure. The data on
21 active smoking would lead to the conclusion that
22 people shouldn't be exposed to secondhand smoke
23 either.

24 He surfaced that issue, and it became an
25 issue of great conflict between his office and the

1 tobacco industry, and, therefore, he --

2 Unidentified Voice: This is all classic
3 hearsay testimony.

4 The Court: Overrule the objection on
5 that.

6 A. And that resulted in his asking for the
7 Office on Smoking and Health to specifically address
8 the science on this issue, and that was the
9 antecedent to the -- or the reason why, in 1975,
10 when I was authoring that report, we also took a
11 second look at the data, because a lot of new
12 information had accumulated scientifically.

13 So that's my understanding of the reason
14 why that first chapter was written.

15 Q. Now, you've mentioned that secondhand
16 smoke was dealt with in the 1972 Surgeon General's
17 Report; again, in the 1975 Surgeon General's Report,
18 which you basically wrote?

19 A. That's correct.

20 Q. Okay. Now, between 1975 and 1986, was the
21 subject of secondhand smoke dealt with again in a
22 Surgeon General's Report?

23 A. Yes. It was also dealt with in 1979, and
24 they were -- it was also dealt with, again, in the
25 report on cancer in 1982, as well as I believe there

1 was a section in the 1984 report, as well, one on
2 lung disease.

3 Q. With respect to the 1979 Surgeon General's
4 Report, and the jury has heard from Dr. Milton
5 Richmond, who was Surgeon General at that time, what
6 was your specific role with respect to the '79
7 Surgeon General's Report?

8 A. I was one of the editors of the 1979
9 Surgeon General's Report. I also authored the
10 chapter on involuntary smoking and the chapter on
11 pipe and cigar smoking.

12 Q. We've all heard of the 1964 Surgeon
13 General's Report, because it got so much publicity
14 at the time, correct?

15 A. Uh-huh.

16 Q. Okay. The thrust of the 1964 Surgeon
17 General's Report is what?

18 A. Well, the 1964 Surgeon General's Report
19 was not really a report of the Surgeon General; it
20 was a report of an expert committee of scientists to
21 the Surgeon General. Because of the intense
22 political controversy surrounding the science on
23 tobacco, the Surgeon General asked a group of
24 experts, over the course of a year, to get together,
25 review all of the evidence available and to draw

1 conclusions from that evidence about whether tobacco
2 smoke caused disease, and the principal conclusion
3 of that report was that cigarette smoking did,
4 indeed, cause lung cancer in men.

5 Q. Now, was that the -- was that the first
6 time, from the standpoint of any Surgeon General's
7 Report, that that issue was specifically dealt with,
8 the causal relationship between smoking and disease?

9 A. That's what we have traditionally
10 considered the first in the series of -- what we
11 call Surgeon General's Reports. The Surgeon
12 General, actually, in '58 or '59, Surgeon General
13 Burney expressed an opinion that the evidence
14 supported lung cancer being caused by cigarette
15 smoking.

16 Q. Now --

17 A. But that was not a volume of review of
18 scientific evidence.

19 Q. Dr. Burns, you are a Fellow of the
20 American College of Chest Physicians?

21 A. I am.

22 Q. What is that organization?

23 A. The American College of Chest Physicians
24 is the group of physicians who specialize in lung
25 disease and heart disease, and it is a professional

1 society. They have meetings -- scientific meetings
2 to keep us up to date on various aspects of the
3 science and treatment of heart and lung disease.

4 Q. And you are also a member of the American
5 Thoracic Society and the Society of Critical Care
6 Medicine? You've already explained critical care.

7 The American Thoracic Society is what?

8 A. The American Thoracic Society is the
9 physician, professional scientific arm, if you will,
10 of the American Lung Association. They are
11 dedicated to the science of lung disease, and they
12 have national meetings and produce a series of
13 materials, educational and otherwise, to help train
14 and keep people current in aspects of science that
15 relate to lung disease.

16 Q. Let me ask you about a couple of awards
17 that you've received. The Surgeon Generals'
18 Medallion in 1989. What's the basis for awarding
19 that to a particular physician?

20 A. That was an award by Dr. C. Everett Koop
21 for the work that I had done in Tobacco Control, and
22 particularly for the work that had I done in editing
23 the Surgeon General's Report.

24 Q. You received the American Lung Association
25 Life and Breath Award for distinguished community

1 service. What was that in recognition of?

2 A. San Diego was one of the early communities
3 that began to pass regulation that has protected
4 nonsmokers from exposure to environmental tobacco
5 smoke, and because of my expertise in this area, the
6 Lung Association had turned to me for help, and I
7 had worked with them in making presentations to city
8 councils and the board of supervisors for the
9 county, and working on several task groups for the
10 board of supervisors, to work out how these
11 regulations would be put in place and to actually
12 get them implemented. And I received that award for
13 that work.

14 Q. I'm going to ask you just a couple of
15 questions about a couple of publications.

16 The health consequences of involuntary
17 smoking, which you -- you referred to it as
18 proceedings of the Third World Conference on Smoking
19 and Health, held in 1979 -- 1975. What does that
20 Third World Conference refer to?

21 A. There have been a series of World
22 Congresses on tobacco issues. They are drawing
23 people from all around the world, developing
24 nations, developed nations, people from the U.S.,
25 Canada, Europe, Asia, Africa, all different

1 countries. They come together to exchange
2 information about the disease risks associated with
3 tobacco, about the methods by which you can help
4 people quit, about methods to help prevent kids from
5 starting, and a variety of other issues that relate
6 to tobacco.

7 This was the third of those meetings, and
8 it was held in New York, and I presented a paper
9 that was part of that proceeding.

10 Q. Now, the Health Consequences of Smoking
11 for Women, it's not clear to me, was that actually a
12 part of the Surgeon General's Report, or was it a
13 second publication?

14 A. The 1979 Surgeon General's Report, which
15 you can see sitting on the table, is a document
16 about 2,500 pages long, covered the entire
17 waterfront of science of what we knew, and it was
18 felt that the understanding of the scientific
19 community and public health would benefit from
20 focused examinations of very specific issues.

21 One of the issues that was principally of
22 concern at that time was whether women were somehow
23 protected from the disease consequences of smoking.
24 They had lower rates of lung cancer. They had lower
25 rates of heart disease. Did that mean that they

1 were protected somehow from the effects of smoking?

2 And so, therefore, we spent an entire year
3 preparing a document that looked at all of the
4 science that was available that examined the risk
5 specifically for women.

6 Obviously, women have some special risks,
7 as well, that relate to use of oral contraceptives
8 and the fact that smoking causes complications of
9 pregnancy, and women are, obviously, the only ones
10 who become pregnant. So, there were some special
11 consequences that we wanted to deal with in that
12 volume, as well.

13 Q. Is there, at the present time, any
14 controversy in the medical and scientific
15 communities across the United States on the
16 scientific question as to whether secondhand smoke
17 causes disease?

18 A. No. There is no longer any scientific
19 controversy in the scientific community as to
20 whether or not exposure to secondhand smoke causes
21 disease. The science has been examined over and
22 over again, and there is no longer any doubt.

23 Q. How long has that been the situation,
24 where essentially there -- there has been no
25 controversy on that issue in the medical and

1 scientific communities?

2 A. I think that the U.S. Surgeon General's
3 Report in 1986 and the report of the National
4 Academy of Sciences in 1986 represent the end of the
5 scientific debate about whether cigarette smoke, as
6 environmental tobacco smoke, could cause disease in
7 nonsmokers.

8 Q. Answer this question. Let me move away
9 for a moment from the subject of secondhand smoke,
10 specifically, and ask you, generally, how the EPA,
11 or any other governmental agency, goes about banning
12 an environmental agent which they consider to be
13 dangerous to the public's health, and give a couple
14 of examples of some of these agents.

15 A. Sure. There are several ways that they go
16 about it, but the principal way is that they become
17 concerned about an agent, and then they assemble all
18 of the science that they can, all of the information
19 available in the scientific literature on that
20 subject, and they look at it.

21 And then they put out a draft that says:
22 This is what we think is going on. This is what we
23 think the science says.

24 And various groups come in and offer new
25 information, offer critiques of their position, and

1 the regulatory agency tries to be very neutral in
2 examining the science, to be sure that it's being
3 fair and direct.

4 Normally what happens, for example, with
5 asbestos exposure, something that there has been
6 great regulatory control and change over, over the
7 last 20 or 30 years; that you look at the agent and
8 you say: Is this hazardous? And you look at people
9 who have high-dose exposure, people who worked as
10 insulators where they spray asbestos on buildings,
11 and therefore inhale it in high concentrations for
12 very long periods of time. That then establishes
13 whether the agent causes disease.

14 Then the question is, how far down do you
15 have to reduce that exposure before you can be
16 comfortable that either it doesn't cause disease or
17 that the disease would be very rare?

18 So you look at populations, then, with
19 lower doses of exposure, until you find groups that
20 have very small exposures to asbestos, but you can,
21 indeed, demonstrate an increased risk. And you then
22 look at how much exposure that was. And then
23 because often the measurement requires a fair amount
24 of disease.

25 I mean, the way we measure this,

1 particularly in people, is by seeing how many people
2 get sick. So if you have an increased number of
3 people getting sick who have an exposure, that
4 usually means that there's a substantial, in a human
5 sense, amount of disease occurring in people that
6 you don't want to have happen.

7 And so what you do is draw a line from
8 that high-dose exposure to the lower dose exposure,
9 until you get down and extend it down until you're
10 down where you are comfortable that the level of
11 disease that might be produced is small enough that
12 it is substantive in a human sense; it doesn't cause
13 enough people to get sick that you and I would think
14 that it was a meaningful risk, and that's what they
15 set the level at, with asbestos. They first set a
16 level at 5. There are no studies that show at 5
17 fibers per cc, which is the standard, that there is
18 an increased risk of developing disease from
19 asbestos.

20 But when you extend it downward, and you
21 consider the limited number of people that have that
22 exposure, you would be concerned that a lot of folks
23 might get sick. And so they changed it in the late
24 '70s, early '80s, down to two; ultimately in the mid
25 '80s, down to . 5, and now they have banned

1 asbestos, because of its toxicity.

2 The same thing is true of, for example,
3 ozone. But in ozone, things are a little bit
4 different. From that, what they do is they do both
5 human studies and animal studies. They expose
6 animals to ozone to see what happens to the lung.
7 You get a significant irritation response when the
8 level of ozone is high. You begin to cough, you
9 begin to have extra secretions in your chest, with
10 high levels of ozone exposure.

11 You test that in animals to see what
12 happens, and then you look at populations in cities
13 like Denver and Los Angeles that have high
14 concentrations of ozone, and you compare them to
15 other populations with lower concentrations, and you
16 look to see whether there's a significant amount of
17 illness, respiratory infections, getting the flu or
18 getting an upper respiratory infection that occurs
19 in those populations, and you also look at people
20 who come in for a period of time and first get
21 exposed to that high level, and see whether changes
22 occur in those populations.

23 The same thing has been done with dust in
24 the air, little tiny particles They actually are
25 most concerned about the particles that are small

1 enough for you to be able to inhale them into your
2 lung and have them stick in your lung. Those are
3 called respirable or inhalable particles.

4 And we have known for some time that there
5 was a concern, because in very high levels of
6 exposure, in, for instance, in London when they had
7 air emergencies, with all of the coal-burning fires
8 that people had in London, a number of people who
9 were sick with heart and lung disease died each time
10 that air pollution went up from these respirable
11 particulates.

12 Since then, we've examined larger
13 populations, and we've become concerned and have
14 developed evidence to show that lower levels of
15 those particles may cause problems for a lot of us.
16 And so they have extrapolated downward and are
17 trying to set the level of inhalable particles below
18 the level at which it would cause disease in the
19 general population.

20 So that's the process by which any
21 governmental agency that's responsible for
22 regulating an agent goes about examining this
23 process.

24 Q. Dr. Burns, I think where we left off was,
25 I asked you about the fact, you discussed the

1 process with respect to ozone, with respect to
2 asbestos, and then I had asked you, was that process
3 followed with respect to secondhand smoke? What was
4 your answer to that question?

5 A. My answer was, no, it was not.

6 Q. And my next question is, why not, to your
7 knowledge?

8 A. Well, there were two principal reasons why
9 not. The first is that the tobacco industry had
10 been successful at casting the question such that,
11 what is secondhand smoke? It's something different;
12 it's not tobacco smoke. We have no understanding of
13 this brand new agent. It's not the same tobacco
14 smoke that people inhale, it's completely different,
15 and until we have completely examined it, it's a
16 brand new exposure.

17 And the second reason was that the Office
18 on Smoking and Health at that time was under intense
19 pressure to be very conservative in what it was
20 doing. It was very reluctant, because of that
21 pressure, to extrapolate or extend beyond the data
22 they had, to do the kind of downward extension from
23 known data, projecting out to what should happen
24 that is normally done for any other occupational
25 exposure.

1 And so, the office itself was very
2 reluctant to do that type of downward extrapolation
3 without data.

4 Whenever we put out a Surgeon General's
5 Report, we would tend to look at what the data could
6 show, and then we'd take one step back in order to
7 be conservative, because we knew that anything we
8 said would be intensely criticized.

9 Q. Dr. Burns, based upon your education,
10 training, experience, the whole gamut of your
11 hands-on medical practice, your work in the public
12 health sector, all your work in connection with the
13 Surgeon General's Reports, and from every other
14 source in your professional life and capacity, do
15 you have an opinion, based upon reasonable medical
16 probability, as to whether exposure to secondhand
17 tobacco smoke, in airline cabins, causes lung cancer
18 and heart disease in flight attendants?

19 A. Yes, I do.

20 Q. And what is that opinion?

21 A. I believe that the evidence clearly
22 establishes that secondhand smoke exposure in flight
23 attendants causes lung cancer and causes heart
24 disease in those individuals who are nonsmokers.

25 Q. Based upon reasonable medical and

1 scientific probability, can you state the amount and
2 duration of exposure to secondhand tobacco smoke
3 that causes lung cancer and heart disease?

4 A. Yes. The level is really quite easy. The
5 level is that level that exists in the general
6 environment as typified by the levels in a home
7 where someone is smoking. Those levels are very
8 comparable to those flight attendants' experience on
9 a regular bases during a flight in which smoking is
10 allowed.

11 The duration is a little bit more
12 complicated, but, in general, a duration of five
13 years or more would be consistent with considering
14 that intensity of exposure as a cause of that
15 disease.

16 Q. And do you have an opinion based upon
17 reasonable medical probability, as to whether flight
18 attendants' exposure to secondhand tobacco smoke in
19 airline cabins causes respiratory and pulmonary
20 diseases and disorders, including chronic
21 bronchitis, sinus disease, aggravation of asthmatic
22 conditions and allergies, as well as respiratory
23 ailments and lung disease?

24 A. Yes. Those diseases are largely diseases
25 that respond to the irritant character of smoke, the

1 irritation and the abrasive nature of the chemicals
2 in the smoke itself, and so regular exposure to that
3 irritant over the course of about a year would be
4 enough to cause problems with your sinuses, would
5 cause changes in the small airways of your lung and
6 could produce a chronic cough.

7 Q. Dr. Burns, do you have an opinion, based
8 upon reasonable medical probability, as to whether
9 exposure to secondhand smoke by flight attendants
10 causes the same diseases and disorders caused from
11 direct smoke?

12 A. Yes. In general, as a principle, if an
13 agent in high dose causes a kind of cancer, in lower
14 doses you would expect the same cancer to be caused
15 but at a lower frequency.

16 Q. Dr. Burns, based upon reasonable medical
17 probability, what diseases are caused by direct
18 smoking that would also, in your opinion, be caused
19 from exposure to secondhand tobacco smoke in airline
20 cabins by flight attendants?

21 A. The --

22 Q. Other than the ones you've already
23 mentioned.

24 A. Okay. The principal ones are cancer of
25 the oral cavity; cancer of the esophagus, the tube

1 that you swallow from your mouth to your stomach;
2 cancer of the larynx, your voice box; cancer of the
3 pancreas, kidney and bladder. All of those are
4 cancers that are clearly causally associated with
5 cigarette smoking.

6 In addition, you would expect some
7 increased risk of cerebrovascular disease and some
8 increased risk of diseases of the aorta.

9 Q. And based upon reasonable medical and
10 scientific possibility, what would be the amount and
11 duration of exposure to secondhand smoke that would
12 cause these diseases which you've just mentioned?

13 A. Again, one would expect that those
14 diseases would require an intensity and the duration
15 of exposure comparable to that for lung cancer, so I
16 would expect that it would require the intensity of
17 that which we see in a home environment where
18 someone is smoking and the duration of at least five
19 years.

20 Q. In the course of your adult life, have you
21 had occasion to fly a lot?

22 A. Yes. Unfortunately, I have had occasion
23 to fly more than I would actually care to.

24 Q. As a matter of fact, yesterday you flew in
25 from San Diego, and tonight you're flying back to

1 San Diego?

2 A. Tonight I'm flying back to San Diego,
3 that's correct.

4 Q. Which is not unusual?

5 A. Not unusual.

6 Q. And before the ban went into effect, the
7 smoking ban went into effect, in 1990, did you have
8 occasion to personally observe the impact, the
9 effect of secondhand tobacco smoke in airline
10 cabins?

11 A. Absolutely, both in the nonsmoking
12 section, where almost always I was able to get a
13 seat, but occasionally, in the smoking section,
14 which I would be able to get the last seat on the
15 plane and had to make a choice about whether or not
16 I would get to my destination or take a smoking
17 seat. So I've had experience with both nonsmoking
18 sections and smoking sections.

19 Q. And in general, what were your
20 observations about secondhand smoke in airline
21 cabins?

22 A. My observation was that even in the
23 nonsmoking section, if there were significant
24 numbers of people smoking, you could smell the
25 smoke, and you could also, quite clearly, smell it

1 on your clothes when you got off the plane; that is,
2 when you took your clothes out of your hanging bag
3 or your jacket that you put in the overhead, you
4 could very clearly, when you put it on, smell the
5 smoke there.

6 The intensity of the exposure was one that
7 was tolerable, but annoying. However, when I was
8 sitting in the smoking section. you could see the
9 smoke in the air; you could taste it. It made my
10 eyes burn. It was a very penetrating and annoying
11 level of smoke. It caused irritation when I inhaled
12 it, and it was a -- what I would characterize as a
13 quite intense exposure and one that I would not
14 voluntarily subject myself to if I had any other
15 choice.

16 And it's one that would have, if I had
17 been sitting in a restaurant, it was a level of
18 exposure that would have left me to leave -- led me
19 to leave. It's a little harder to do on an
20 airplane.

21 Q. Dr. Burns, other than the Surgeon General,
22 the EPA, the Public Health Service, what other
23 official agencies, either a government of the United
24 States or worldwide, have taken an official position
25 with respect to secondhand smoke causing disease in

1 healthy, nonsmokers?

2 Unidentified Voice: Objection, Your

3 Honor.

4 Mr. Rosenblatt: He's a member --

5 Unidentified Voice: A member.

6 Mr. Rosenblatt: I said he's a member of
7 some of them.

8 The Court: All right. Within your own
9 personal knowledge, sir.

10 A. All right. I'm very familiar with the
11 fact that the American Medical Association, American
12 Thoracic Society, American College of Chest
13 Physicians, World Health Organization, American Lung
14 Association, American Cancer Society, American Heart
15 Association, the Canadian government, the British
16 government, British Public Health Service, World
17 College of Physicians, have all taken positions on
18 secondhand smoke that are the same as the one that
19 I've just taken.

20 Q. So who is on the other side of the table?

21 A. The only group on the other side at this
22 point in time is the tobacco industry and their
23 representatives. There simply is no controversy
24 scientifically.

25 Q. Dr. Burns, before I contacted you and

1 asked you whether you would be willing to serve as a
2 witness in this case, had we known each other?

3 A. No.

4 Q. Had we had any connection whatsoever?

5 A. No.

6 Q. Are you charging for your services, for
7 your time in testifying in this case, either for
8 having given an all-day deposition, or for your
9 testimony today?

10 A. I did bill the tobacco industry for the
11 deposition. I'm not billing for my time today or
12 for the time I've spent preparing for this case.

13 Mr. Rosenblatt: Thank you, Dr. Burns.

14 Mr. Hardy: Good morning. I'm David
15 Hardy.

16 Q. And we've met before, haven't we?

17 A. Yes, we did. I believe we met in a case.

18 Q. Prior litigation.

19 A. That's correct.

20 Q. Rogers, in Indiana last summer, do you
21 remember?

22 A. I do, indeed.

23 Q. I have a number of questions that I need
24 to ask you.

25 As you said, of the first draft of the

1 Surgeon General's Report, you did not believe that
2 environmental tobacco smoke caused any serious
3 disease in adults, did you?

4 A. No, that's not quite true. I did not
5 believe that there was evidence at that time to
6 establish that it caused disease in adults, and I
7 actually believe at that point in time, I had doubts
8 about whether it caused lung cancer.

9 Q. You had doubts about whether it caused any
10 serious disease, didn't you?

11 A. No. I actually in that document, I
12 described a number of significant problems that
13 both, particularly children, but also adults had. I
14 would consider those significant problems.

15 Q. Do you remember, Doctor, making a speech
16 in 1975, which was later reprinted in the Journal of
17 Breathing, a speech that you made at the Workshop on
18 Rights of Nonsmokers conducted by the National
19 Inter-Agency Council on Smoking and Health in New
20 York, held at the University of Maryland?

21 A. I remembered that I did make a speech, and
22 that it was published. The details, obviously, are
23 not ones that I have in my memory at the moment.

24 (Exhibit marked by the clerk.)

25 Q. Doctor, I show you -- may I approach, Your

1 Honor.

2 The Court: Certainly.

3 Q. I show you what the reporter has marked as
4 Defendants' Exhibit H, and ask if you recognize that
5 as a copy or a reprint of your 1975 speech at the
6 workshop I referenced published in the Journal of
7 breathing that same year.

8 A. I am happy to accept that this is, indeed,
9 that document. I don't really recognize it. There
10 is no reason to expect not.

11 The Court: If you keep it off the
12 microphone, you won't make that much noise.

13 THE WITNESS: Technology is always
14 difficult.

15 Q. I think if you turned to the right spot
16 there, Page 7 at the bottom, right-hand column,
17 third full paragraph down, starting with: "The
18 question also arises," do you see that?

19 A. First full paragraph down?

20 Q. Third full paragraph down.

21 Do you see the paragraph that starts with:
22 "The question also arises"?

23 A. Yes. I'm sorry. I was in the wrong
24 column.

25 Q. Got it?

1 A. Yes.

2 Q. All right. See if I read this accurately.

3 "The question also arises as to the importance of
4 involuntary smoking exposure in the development of
5 heart and lung disease. With respect to lung
6 cancer, there is no evidence to indicate whether or
7 not this level of exposure has an effect on the
8 risks of developing lung cancer.

9 "However, because of the low dosage and
10 brief exposure, it would seem unlikely that there
11 would be a significant increase in the risks of
12 developing lung cancer. The same situation occurs
13 with chronic bronchitis and emphysema. On the
14 question of the development of heart disease, there
15 is some evidence that intermittent exposure to
16 carbon monoxide, together with a high cholesterol
17 diet, produces atherosclerosis. However, this
18 evidence has been obtained in animal studies, and it
19 is always difficult to determine what significance
20 animal experiments have for human disease."

21 That's what you said in 1975, isn't it,
22 Doctor?

23 A. Right. I believe that that's consistent
24 with what I just said to you.

25 Q. And that is the way you felt at that time?

1 A. That is the way I felt as a representative
2 of the Centers for Disease Control and the National
3 Clearinghouse for Smoking and Health.

4 It was understood at that time that I was
5 representing that organization. and they were
6 extraordinarily reluctant to allow us to go beyond
7 existing data, or to expand beyond what the data
8 actually showed for the disease in question; that
9 is, they would not countenance our extrapolating
10 downward from active cigarette smoke exposure to the
11 lower-dose exposures that occur within environmental
12 tobacco smoke.

13 Q. They were requiring you to stick to the
14 proof, in other words?

15 A. No. they were requiring us to stay within
16 data that had been generated on populations for
17 which that data was appropriate, rather than doing
18 the normal public policy approach, which is to
19 extrapolate from populations with high-dose exposure
20 to populations with lower dose exposure.

21 Q. I will give you a chance to talk about
22 this extrapolation idea, but just to be sure we're
23 clear, when you use that word, it's not -- by
24 extrapolate, you mean predict from one set of data
25 what something else is going to be? Is "predict"

1 the fair general term for extrapolating?

2 A. "Predict" is the wrong word. What you're
3 doing is you're taking an observation, in this case,
4 at one level or one set of levels of exposure, and
5 you're saying, if this relationship to dose exists
6 in a population of smokers, if we extend it downward
7 to levels of exposure where we don't have people to
8 examine, what would be the effect?

9 So you're extending downward the
10 relationship between dose and effect. And that's
11 very commonly done for all environmental
12 regulations.

13 Q. Doctor, you have been very active as an
14 expert witness in lawsuits, haven't you?

15 A. I have testified a number of times. I
16 think I've probably testified in tobacco cases eight
17 or nine times over the last 15 years.

18 Q. And if we expand that to be both testimony
19 in court and deposition and consultancy with
20 plaintiffs' lawyers, then we're talking about
21 something more like 30 times, aren't we?

22 A. That's probably correct. I mean, I don't
23 have -- I don't keep a running tab on that.

24 Q. And, in fact, for several years now,
25 hasn't approximately 10 percent of your total annual

1 income been from consulting or testifying by
2 deposition or in court in tobacco cases?

3 A. It's probably close to that. A little bit
4 more; a little bit less some years.

5 This case won't add much to my income.

6 Q. By the way, you do charge \$350 an hour to
7 the tobacco companies for taking your deposition?

8 A. My normal rate for medical expert witness
9 testimony is \$350 an hour, yes.

10 Q. Sometimes you charge plaintiffs for that
11 and sometimes you don't?

12 A. That's correct.

13 Q. And you tried to charge the tobacco
14 company \$500 a hour a few years ago to give your
15 deposition in Mississippi, didn't you?

16 A. No, actually I didn't. What happened was
17 that the lawyer who was trying that case suggested
18 that that would be the fee that I ought to request.
19 The court, in its wisdom, decided that that was too
20 much, and I was not reimbursed at that rate.

21 Q. Let me test your memory just a little bit.

22 With respect to these tobacco cases,
23 you've been involved in them for about 20 years,
24 haven't you?

25 A. I don't know about 20, but certainly a

1 fair number of years. Much more than ten.

2 Q. Do you remember the Browner case against
3 RJ Reynolds in California? You consulted on that
4 one but I think didn't testify, is that right?

5 A. I don't actually think I even consulted on
6 it. I believe I was named as a witness but never
7 reviewed records or consulted with an attorney on
8 it.

9 Q. How about the Palmer case against Liggett
10 in Massachusetts?

11 A. That was also a case in which -- I may
12 have looked at a couple of records, but I never was
13 deposed or testified or really discussed it
14 extensively with any of the attorneys involved.

15 Q. And you testified on behalf of a man named
16 Roiznen against RJ Reynolds, both by deposition and
17 in court, didn't you?

18 A. I believe that that's correct. That was
19 in Kentucky, I think.

20 Q. And you've been listed as an expert and
21 consulted in a number of smoking and health cases in
22 Texas?

23 A. That's correct. I don't believe I
24 reviewed any records or did any real consultation,
25 though.

1 Q. Foren, Alston, Rock, Gibb, Carlyle, Wood
2 and Dire?

3 A. I believe those were names of cases in
4 which I was named, but not ones where I did any
5 work.

6 Q. Couple of case in New Hampshire: Ganesis
7 and Ramsey, Buckingham?

8 A. Again, those were cases in which the
9 lawyers listed me as an expert, but did not -- did
10 not do any work with those cases.

11 Q. You testified by deposition and in court
12 in Wilks in Mississippi against American?

13 A. That's correct.

14 Q. You've already been deposed in the Castano
15 case in Louisiana?

16 A. That's correct.

17 Q. And you've been deposed in the Moore case
18 in Mississippi?

19 A. That's correct.

20 Q. And in Arch in Pennsylvania earlier this
21 year?

22 A. Right. That's correct.

23 Q. Last year or the year before in Sackman in
24 New York?

25 A. That's correct.

1 Q. Of course, we've covered Rogers. And the
2 Bluwit case in Texas?

3 A. Yes. That's correct.

4 Q. And you were retained by Mr. Rosenblatt to
5 testify in another case of his, Engle, aren't you?

6 A. I've agreed to testify in that case as
7 well.

8 Q. Aren't you noticed for your deposition in
9 that case next week?

10 A. I believe so, although --

11 Q. Tuesday?

12 A. Although I wasn't clear whether that was
13 going to happen or not, given the delay in that
14 case.

15 Q. Let's talk about extrapolation.

16 You spoke about that a little bit on
17 direct examination and again this morning, before we
18 broke for lunch.

19 You really can't extrapolate from
20 mainstream to ETS, can you?

21 A. I have -- that statement is incredibly
22 broad. Extrapolation is commonly done. It's
23 possible to do it. They are quite similar agents.
24 I'm not sure what you're saying when you say you
25 can't extrapolate.

1 Q. Let me put it this way. Didn't the '86
2 Surgeon General say you had to look at them
3 separately and also the two '86 NRC reports?

4 A. What they said was that these were agents
5 that were fundamentally similar. They contained the
6 same constituents. There were composition
7 differences. They are -- actually because of the
8 temperature at which environmental tobacco smoke is
9 generated, it's not as hot. When you draw through
10 the cigarette, you get a very bright coal, a
11 high-heat cone, which you burn the tobacco. That
12 completes combustion a little bit more, so when you
13 generate the smoke, that curls up between the tips,
14 in between puffs, you actually get less complete
15 combustion than if you get more of the organic
16 compounds and some of the irritants in the smoke.
17 So there's some difference in composition.

18 And the big difference, of course, is that
19 you spread it out over an entire room before you
20 inhale it, as opposed to inhaling it directly as a
21 stream.

22 So there are a number of differences that
23 need to be examined, but that's not to say that the
24 differences are such that you cannot compare the
25 two, because as far as I am aware, most of the

1 groups that have looked at this issue have drawn
2 heavily on the data for active cigarette smoking.

3 Q. And you recall that you have spoken on the
4 subject and acknowledged that "Because of the
5 qualitative difference in smoke inhaled by the
6 nonsmoker, the health effects are likely to differ
7 from the effects of the same quantity of smoke
8 received by actually smoking cigarettes, and we
9 must, therefore, approach the possible health
10 effects of involuntary smoking as a problem separate
11 from that of voluntary smoking."

12 A. That's correct. I said that, I believe,
13 in --

14 Q. 1975 --

15 A. -- 1975.

16 Q. -- at the Third World Conference?

17 A. That was the position, again, of the
18 Office on Smoking and Health at that time, that we
19 had to be very conservative in these statements,
20 which we --

21 Q. Well, you believed that, didn't you?

22 A. I believed that we needed to look at the
23 differences, that's correct.

24 Q. I mean, you weren't making a statement
25 that you didn't believe because you were speaking

1 for the Office on Smoking and Health?

2 A. If you would allow me to complete my
3 answer, I would be happy to try and complete it --

4 Q. Sure.

5 A. -- and then you can ask me any questions
6 that you think are incomplete.

7 Q. Sure.

8 A. My belief at that time was that it was
9 important to examine those differences, to the
10 extent that the differences are substantive, to the
11 extent that they are quantitative and qualitatively
12 distinct, they need to be taken into account as you
13 look at the data.

14 We did examine that subsequently. We
15 examined it, actually, over the next 15 years,
16 looking at detail of the differences between
17 environmental tobacco smoke, its composition, the
18 sidestream smoke, which is the smoke that curls up
19 from the tip of the cigarette, in comparison to
20 mainstream smoke.

21 Having examined that, the conclusion is
22 that there are some compositional differences, but
23 that the same toxic and carcinogenic substances that
24 are present in mainstream smoke are present in
25 environmental tobacco smoke, and that for all

1 intents and purposes, the qualitative outcomes
2 should be similar; therefore, the additional data
3 that became available clarified that statement.

4 Q. You said you were speaking on behalf of
5 the Office of Smoking and Health. That's why I
6 really, when you said that, that's the reason I'm
7 curious, because my question is, did you mean what
8 you said in 1975?

9 A. I meant what I said as a conservative
10 scientist, that's correct.

11 Mr. Hardy: All right. Thank you.

12 (The video was concluded.)

13 THE COURT: That's it? Mr. Hunter, do you
14 have anything else?

15 MR. HUNTER: The plaintiffs rest.

16 THE COURT: All right. Do you have a --

17 MR. HUNTER: Subject to the introduction
18 of certain documentary evidence.

19 THE COURT: Well, the one document I
20 thought you were interested in was the --

21 MR. HUNTER: Oh, yes.

22 MR. GERSON: We have the --

23 THE COURT: -- life tables. What exhibit
24 is that?

25 THE CLERK: Plaintiff's 11.

1 THE COURT: Plaintiff's Exhibit 11.

2 MR. GERSON: Ladies and gentlemen, I am
3 privileged to read to you from the -- what's
4 called the mortality tables, which states that
5 the expectation of life for an American female,
6 age 59, is 25.1 years.

7 THE COURT: And subject to the other
8 matters, you rest at this time?

9 MR. HUNTER: Yes, Judge.

10 THE COURT: Okay. Ladies and gentlemen,
11 what I'm going to do now is let you all get a
12 little breather for the rest of the afternoon
13 and ask you to remember my instructions about
14 media and the press and whatnot, and other than
15 that, just enjoy a good afternoon and come back
16 and be on the second floor at about 9:45, and
17 we'll start with the defense case tomorrow.

18 Have a good evening with our thanks.

19 (The jury exited the courtroom.)

20 THE COURT: If you all want to get
21 comfortable, since the jury is not here, please
22 do. Feel free.

23 MR. CHUMBLEY: Judge, can we take a short
24 break, Your Honor?

25 THE COURT: That's a good idea.

1 Gentlemen, I'll accept that. We'll take five
2 minutes.

3 (A short recess was taken.)

4 THE COURT: Okay. What do we need to take
5 care of?

6 MR. CHUMBLEY: Judge, I've got some
7 motions to make, but I guess they've got some
8 evidence to put in. We can do that first.

9 THE COURT: Have you had a chance to look
10 at what they're putting in? I know you've seen
11 it because it's been marked.

12 MR. CHUMBLEY: I don't know whether
13 they've told us.

14 MR. UPSHAW: Specifically after they've
15 had a chance to look at it.

16 MR. HUNTER: We wanted to move in the
17 Surgeon General's Reports that were referenced.

18 THE CLERK: 1-C, Judge.

19 MR. HUNTER: Which is, as I'm looking at
20 them, 1989, 1986, 1984, 1979, 1964.

21 THE COURT: Any problem?

22 MR. REILLY: We object to all of them,
23 Your Honor, on various grounds, including the
24 fact that they're hearsay. The fact that
25 they've simply been mentioned in depositions --

1 I'm sorry -- in trial testimony, doesn't make
2 the documents admissible. They're also, in
3 large measure, wholly irrelevant to the case at
4 hand, and, as I said previously, they contain
5 hearsay and are not admissible under any
6 exception to the hearsay rule.

7 THE COURT: Mr. Hunter.

8 MR. HUNTER: Judge, these documents are
9 admitted -- are admissible under two separate
10 bases: Number one, as an exception to the
11 hearsay rule, as a report conducted by a
12 governmental authority that's mandated and
13 under a duty to report its findings; and,
14 second, as the Court can take judicial notice
15 of these reports.

16 THE COURT: All right. I'm going to admit
17 them.

18 MR. HUNTER: I'm sorry?

19 THE COURT: I'm going to admit them.

20 THE CLERK: Okay. 1-C for the plaintiff
21 marked for identification now becomes
22 Plaintiff's No. 12, composite, admitted in
23 evidence.
24
25

1 (Thereupon, the referred-to document was
2 marked by the Clerk as Plaintiff's Exhibit 12
3 in evidence.)

4 THE COURT: What's the next one?

5 MR. REILLY: For the record, Your Honor, I
6 said they contained wholly irrelevant
7 information. They contain information about
8 diseases that are unrelated to this litigation.
9 Just so I've made the record clear. And I'm
10 relying on the Robins case. That's the basis
11 for our objection.

12 THE COURT: Okay. What's the next one?

13 MR. GERSON: Your Honor, yesterday we
14 moved in the photographs of my client and of
15 the various items of medical equipment that she
16 uses. On the clerk's notes that I have,
17 they're not shown as --

18 THE CLERK: They have --

19 THE COURT: They're in as 5 and 6, 12
20 photographs depicting plaintiff, composite; 12
21 photographs depicting health aids for
22 plaintiff. And --

23 THE CLERK: Those numbers --

24 MR. GERSON: I see that now. I stand
25 corrected. I apologize.

1 Our Exhibit 1-H, then, is subsumed by the
2 ruling on the Surgeon General's Report, because
3 it is a part of the report.

4 THE COURT: Okay. And that would be
5 subject to the same objections. So that would
6 be in also.

7 MR. REILLY: Your Honor, that includes the
8 prejudices. The probative value outweighs the
9 prejudicial effects.

10 THE COURT: Okay. We'll include that,
11 too.

12 MR. REILLY: Thank you. I think I've
13 covered the waterfront.

14 THE COURT: You've got it covered.

15 THE CLERK: Do you want me to admit it
16 individually, Judge?

17 THE COURT: Yes.

18 THE CLERK: 1-H will be 13 admitted.

19 (Thereupon, the referred-to document was
20 marked by the Clerk as Plaintiff's Exhibit 13
21 in evidence.)

22 MR. ENGRAM: Your Honor, you understand
23 that is a table that refers to constituents of
24 mainstream second, not secondhand smoke?

25 THE COURT: Right. Mortality tables is

1 what number now?

2 THE CLERK: That's No. 11, Judge.

3 (Thereupon, the referred-to document was
4 marked by the Clerk as Plaintiff's Exhibit 11
5 in evidence.)

6 MR. HUNTER: That's all we offer, Judge.

7 THE COURT: You're not going to let
8 Mr. Reilly speak about the tobacco cigarette
9 packages?

10 MR. HUNTER: I think I'd rather wait --

11 THE COURT: I'm just kidding with you.
12 You make your mind up. I just didn't want you
13 to forget.

14 MR. HUNTER: Okay.

15 MR. GERSON: We think they will be --

16 MR. HUNTER: Yes.

17 MR. GERSON: -- relevant later in the
18 case.

19 THE COURT: Okay. Well, I'm not
20 precluding anything. Nothing is written in
21 stone.

22 What's the status of the last one on that
23 page, computer imaging, copies of X-rays used
24 by Dr. Foley?

25 MR. HUNTER: Okay. That's part of

1 Composite 2.

2 THE COURT: Okay. It's already in?

3 MR. HUNTER: Yes.

4 THE COURT: Fine.

5 MR. HUNTER: I will make certain that all
6 of the X-rays are in. But we want them all in,
7 and I'll just make sure we have them all within
8 those two --

9 THE COURT: Okay.

10 MR. HUNTER: -- reports.

11 THE COURT: Any objections to the X-rays
12 and CAT scans?

13 MR. REILLY: Your Honor, we are in
14 agreement. That's already stipulated to. All
15 of the medical records and all of the X-rays
16 are already in evidence.

17 THE COURT: Okay.

18 MR. REILLY: So that includes all of the
19 X-rays that they're moving in at the moment.

20 I don't know that they've all been
21 assigned an --

22 THE COURT: An individual a, b, c,
23 subpart, you mean?

24 MR. REILLY: Yes. They probably haven't
25 been. But I can have Erika work with your

1 clerk to make sure, and whoever from
2 plaintiff's side --

3 THE COURT: Okay.

4 MR. REILLY: -- to make sure all of the --
5 in fact, we'll be using some subsets of the
6 medical records and we'll probably mark them as
7 separate exhibits, too.

8 THE COURT: Okay.

9 MR. REILLY: But all of the medical
10 records are in, by stipulation, as well as
11 flight records -- flight logs.

12 THE CLERK: We can number them 2-A, 2-B,
13 2-C.

14 THE COURT: Okay. That's it?

15 MR. HUNTER: Yes, sir.

16 THE COURT: What I'll do, in case you
17 think of something overnight, if you have,
18 bring it up in the morning.

19 MR. REILLY: Your Honor, in light of that,
20 I think we can't argue our motions for directed
21 verdict until all of the evidence is in. Just
22 a precaution on my part. I'm just one of those
23 people.

24 THE COURT: Let's have the argument. I
25 can't imagine it, but I'm not going to -- we've

1 got some time now. I'd like to start up
2 tomorrow at 10:00, and start your case, as
3 opposed to listening to arguments.

4 MR. REILLY: I do, too. That's why I
5 just -- I object to them being given. If we're
6 going to make our argument --

7 THE COURT: I understand where you're
8 coming from.

9 MR. REILLY: I just object to --

10 THE COURT: I just don't think it will
11 have any relevance.

12 MR. REILLY: I just --

13 THE COURT: Your objection is noted.
14 Let's put it that way.

15 Okay. So let's have the arguments for
16 directed verdict.

17 MR. CHUMBLEY: Your Honor, I'll try to be
18 as brief as I can.

19 Could I approach?

20 THE COURT: Sure.

21 MR. CHUMBLEY: And obviously, Your Honor,
22 our motion will be a little briefer than usual
23 because of Judge Kaye's order.

24 At the outset, I want to note for the
25 Court that I'm moving for a directed verdict on

1 behalf of all defendants regarding all claims
2 brought by the plaintiff in this matter,
3 understanding that we've tried this case under
4 Judge Kaye's order dated October 5, year 2000,
5 which, of course, the defendants have objected
6 to and which is currently on appeal.

7 THE COURT: That's correct.

8 MR. CHUMBLEY: That, as Your Honor may
9 suspect, shortens my argument a little bit,
10 because obviously the plaintiffs have not
11 presented any evidence of defect, they haven't
12 presented any evidence of negligence, breach of
13 duty, breach of implied warranty, all of which
14 the defendants feel is incumbent upon the
15 plaintiffs to prove in order to withstand a
16 directed verdict.

17 So, without waiving any of our rights on
18 appeal, under Judge Kaye's order, I'll move for
19 a directed verdict on all claims on behalf of
20 all defendants.

21 Your Honor, the case law is clear that the
22 burden of proof rests with the plaintiff to
23 establish by competent evidence each material
24 fact necessary to recovery; and that upon
25 failure to do so, it's the duty of the trial

1 court, upon appropriate motion, to take the
2 case from the jury and direct a verdict for the
3 defendant.

4 And the case that I've cited in our memo
5 on that issue is the Smith Bakery Case at 134
6 So.2d 519. Even under Judge Kaye's October 5,
7 2000 order, to which the defendants take issue
8 and which is currently on appeal, the plaintiff
9 still has burdens of proof in this case.

10 One is that they have to establish that
11 the plaintiff, Marie Fontana, has certain
12 specific medical conditions; and, two, it is
13 still the plaintiff's burden, even under Judge
14 Kaye's order, to prove by a preponderance of
15 the evidence that the plaintiff's medical
16 condition was, in fact, caused by her exposure
17 to environmental tobacco smoke while she worked
18 as a flight attendant for TWA on board
19 aircraft.

20 One other issue, I think, as a legal
21 issue, the fact that in ruling on a directed
22 verdict, the Court must reject conclusions and
23 opinions that are based on speculation and
24 nothing else, and I cite the cases in my brief:
25 The Husky case at 434 So.2d, the Brinkley case

1 at 453 So.2d, and the Kashuk case at 449 So.2d.

2 What has the plaintiff shown with regard
3 to Marie Fontana's medical condition? What
4 conditions does she have?

5 Mr. Hunter, in opening statement, said:
6 Plaintiff suffers from chronic sinusitis,
7 sarcoidosis, chronic bronchitis and
8 emphysema/COPD.

9 So those are the issues, those are the
10 conditions which Mr. Hunter indicated were at
11 issue in this case.

12 Some of these, I believe, are easy.

13 Let's start with sarcoidosis. There is
14 clearly sufficient evidence in this record that
15 Ms. Fontana suffers from sarcoidosis. In fact,
16 nobody disputes the fact that she suffers from
17 sarcoidosis.

18 The problem here -- and the defendants are
19 moving for a directed verdict on the claim that
20 Marie Fontana's exposure to environmental
21 tobacco smoke, while working on board aircraft,
22 caused her underlying condition of sarcoidosis.

23 There has been no suggestion, there has
24 been no evidence, there has been no testimony
25 by any of the plaintiff's experts; Dr. Foley,

1 Dr. Irvin, specifically said no one knows the
2 cause of sarcoidosis. Neither one of those
3 gentlemen attributed Ms. Fontana's sarcoidosis
4 to her exposure to ETS.

5 Dr. Burns didn't mention it -- well, let's
6 talk about Dr. Burns and Dr. Richmond at the
7 outset. Neither one of those gentlemen offered
8 any testimony specific to Marie Fontana. So,
9 to the extent that plaintiffs have the burden
10 of proving that Marie Fontana's medical
11 condition or conditions were caused by
12 environmental tobacco smoke on board an
13 aircraft cabin, really the only witnesses that
14 are relevant for that purpose are Drs. Foley
15 and Irvin.

16 Zero evidence -- in fact, there's been
17 unanimity in this courtroom that her
18 sarcoidosis was not caused by ETS, or at the
19 very -- that's most favorable to the
20 defendants, but most favorable to the plaintiff
21 is that there's been unanimity in this
22 courtroom that no one knows the cause of
23 sarcoidosis.

24 The defendants, Your Honor, are entitled
25 to a directed verdict on the claim that

1 Ms. Fontana's sarcoidosis was caused by her
2 exposure to ETS.

3 The second condition which Mr. Hunter told
4 the Judge in opening he was going to prove was
5 the condition of chronic sinusitis.

6 Once again, Your Honor, there is no
7 evidence in this record at all that Ms. Fontana
8 has or ever had chronic sinusitis. It's
9 completely devoid of any testimony to that
10 effect.

11 Dr. Foley didn't mention it; Dr. Irvin
12 didn't mention it. It was mentioned by
13 Dr. Burns; again, not specific to Ms. Fontana.
14 And Dr. Irvin mentioned the fact in passing
15 that Ms. Fontana has occasional post-nasal
16 drip. Post-nasal drip is not chronic
17 sinusitis.

18 No one has established in this record by
19 affirmative testimony, either through the
20 medical records or through any witness, that
21 Ms. Fontana has or ever has had chronic
22 sinusitis.

23 In addition, Your Honor, no witness has
24 testified in this Court that even if

25 Ms. Fontana had chronic sinusitis, that her

1 chronic sinusitis was caused by her exposure to
2 environmental tobacco smoke on board aircraft.
3 Zero. None.

4 Mr. Hunter mentioned in opening that she
5 had chronic sinusitis and she had sinus
6 surgery. There is nothing in this record,
7 zero, about even any kind of sinus surgery that
8 Marie Fontana may have had.

9 That claim is completely without any basis
10 in the evidence at this point, Your Honor, and
11 the defendants are entitled to a directed
12 verdict on the plaintiff's claim that
13 Ms. Fontana had chronic sinusitis and that that
14 chronic sinusitis was caused by her exposure to
15 environmental tobacco smoke on board aircraft.

16 The next condition, which has been
17 mentioned more or less in passing, and that is,
18 the claim that Ms. Fontana's sarcoidosis was
19 aggravated or somehow it progressed as a result
20 of her exposure to environmental tobacco smoke
21 while working on board aircraft.

22 Once again, Your Honor, we suggest that
23 there is no credible, admissible evidence that
24 has been presented to this jury that
25 Ms. Fontana's sarcoidosis was aggravated or

1 that it progressed as a result of her exposure
2 to ETS.

3 And I think the credible testimony on that
4 issue, Your Honor, came from plaintiff's
5 expert, Dr. Foley. And I don't know if Your
6 Honor has the daily transcript.

7 THE COURT: I have my own notes. Not as
8 good, but at least it keeps me somewhat
9 informed.

10 MR. CHUMBLEY: Does anybody have Volume 6?
11 May I approach, Your Honor?

12 THE COURT: Sure.

13 MR. CHUMBLEY: Quoting from the testimony
14 of the plaintiff's expert radiologist,
15 Dr. Foley, at Page 716, Line 9:

16 "Question: No one knows what causes
17 sarcoidosis to progress in people, do they?

18 "Answer: Correct."

19 Moving over to Page 720, still the
20 testimony of Dr. Foley, at Line 22:

21 "And no one knows why it progressed in
22 Ms. Fontana, do they?

23 "Answer: That's correct."

24 That is the only -- Judge, that is the
25 only testimony from a medical doctor that has

1 been presented to this jury on the issue of
2 whether exposure to environmental tobacco smoke
3 aggravates or causes sarcoidosis to progress.

4 And we asked two questions. We asked the
5 general causation question: "Does anybody know
6 what causes it to progress?"

7 "No."

8 And then we ask it specific to Ms. Fontana
9 on Page 720: "Does anyone know why it
10 progressed in Ms. Fontana?"

11 And the answer was: "No, no one knows why
12 it progressed in Ms. Fontana."

13 That is the only credible, admissible
14 evidence that's been presented to this jury on
15 the issue of whether sarcoid -- her sarcoid was
16 caused or exacerbated -- excuse me --
17 exacerbated or caused her sarcoid to progress.

18 Plaintiff's other expert, the
19 physiologist, Dr. Irvin, from Vermont, with all
20 due respect, I don't believe ever really gave
21 an opinion on the issue, but if he did, he's
22 certainly not qualified to do that. He's not a
23 medical doctor. He does not practice
24 pulmonology. He's not a radiologist.

25 In fact, Dr. Irvin hasn't done much, if

1 any, research on sarcoidosis. He's never done
2 any research on ETS, much less any supposed
3 relationship between ETS and the progression of
4 sarcoidosis; rather, Dr. Irvin's expertise as a
5 physiologist is based upon his review of
6 articles that he read only for preparation of
7 his testimony in this trial.

8 He's not qualified to give an opinion on
9 whether or not environmental tobacco smoke
10 aggravates or causes sarcoid to progress, and
11 his opinion is inadmissible and not credible.

12 That leaves us with Dr. Foley. I submit,
13 Your Honor, that to the extent that the
14 plaintiffs still have a claim for aggravation
15 of sarcoid as a result of exposure to ETS, the
16 only credible, admissible evidence on that
17 issue indicates that no one knows what causes
18 sarcoid to progress and no one knows why
19 Ms. Fontana's sarcoid progressed.

20 And we are entitled to a directed verdict
21 on the claim of aggravation of the underlying
22 condition of sarcoidosis being made by the
23 plaintiffs in this case.

24 Your Honor, those three claims, sarcoid,
25 chronic sinusitis, and aggravation or

1 progression of sarcoid are clearly -- they're
2 crystal clear. There is nothing in this record
3 that's credible or admissible to withstand a
4 motion for directed verdict on those disease
5 entities.

6 The next disease is chronic bronchitis.
7 What's the evidence that Ms. Fontana has or
8 ever had chronic bronchitis? Certainly it's
9 not in the medical records. There's no --
10 there is no suggestion anywhere in the medical
11 records that have been put into evidence or in
12 any of the medical records that will be put
13 into evidence at any time in this case that
14 Marie Fontana had or ever had chronic
15 bronchitis.

16 And it's interesting, I believe, also,
17 Your Honor, to note that the one medical
18 doctor/expert that testified on behalf of the
19 plaintiff, Dr. Foley, never said to this jury
20 that he was of the opinion that Ms. Fontana had
21 chronic bronchitis.

22 He described the procedures that lead up
23 to chronic bronchitis. He described the
24 disease entity of chronic bronchitis, but
25 nowhere that I could find, and maybe

1 Mr. Hunter, if it's in there, Mr. Hunter will
2 find it, but nowhere that I could find did
3 Dr. Foley affirmatively state that based upon
4 my education and my experience as a
5 radiologist, that's assuming a radiologist
6 could give this kind of opinion in the first
7 place, nowhere in that record did he say
8 Ms. Fontana has chronic bronchitis.

9 You'll recall Dr. Foley with his little
10 laser and, you know, his ELMO, he called it a
11 T.V., and he was looking at the lungs and he
12 was doing this: Emphysema. Emphysema.
13 Centrilobular emphysema.

14 No where did he say Ms. Fontana has
15 chronic bronchitis.

16 In addition, Dr. Foley testified that he
17 agreed with the American Thoracic Society's
18 definition of chronic bronchitis as being the
19 presence of a chronic cough for three months in
20 each of two consecutive years in a patient in
21 which the causes of the cough -- which other
22 causes of the cough have been excluded.

23 He accepted that definition, and nowhere
24 in the definition was there any testimony that
25 Ms. Fontana met the definitional criteria of

1 having chronic bronchitis. Simply no evidence
2 from Mr. Foley on that issue.

3 Dr. Irvin, again, a physiologist.
4 Dr. Irvin is not entitled to and not allowed
5 to, under the law of any state, to make a
6 diagnosis that anyone suffers from any medical
7 condition, much less that someone suffers from
8 chronic bronchitis.

9 The only witness presented to this jury
10 that has anywhere near the credentials to opine
11 on chronic sinusitis failed to affirmatively
12 state to this jury that Ms. Fontana had chronic
13 bronchitis.

14 And similarly, there was no testimony that
15 even if she had the chronic bronchitis, that it
16 was caused by her exposure to environmental
17 tobacco smoke on board aircraft.

18 We respectfully submit that we're entitled
19 to a directed verdict on the issue of chronic
20 bronchitis for plaintiff's failure to prove
21 that Ms. Fontana had it and any -- complete
22 failure of proof on whether if she had it, her
23 chronic bronchitis was caused by ETS.

24 THE COURT: Mr. Hunter.

25 MR. CHUMBLEY: Well, can I --

1 THE COURT: I'm sorry. I thought you
2 were --

3 MR. CHUMBLEY: I have the emphysema, COPD.

4 THE COURT: That's right.

5 MR. CHUMBLEY: In all due respect, I have
6 to say Dr. Foley did opine that Ms. Fontana
7 has, in his opinion, emphysema, which he
8 equates with COPD.

9 THE COURT: That covers both phases.

10 MR. CHUMBLEY: Well, he said they were the
11 same thing, as I recall. I think he equated
12 the two. He said emphysema and COPD are the
13 same thing.

14 Your Honor, again, the testimony on that
15 issue comes from a radiologist, not a
16 pulmonologist, someone who has taken one
17 medical record out of a box and a half, one
18 radiology report, where a radiologist mentioned
19 the fact that she has COPD, along with
20 mentioning the fact that she may have sarcoid,
21 tuberculosis, histoplasmosis, and a bunch of
22 other things, and based his opinion upon
23 something that is not found in Ms. Fontana's
24 medical records anywhere.

25 It's our position that there's been a

1 total lack of any credible, admissible
2 testimony on the issue of whether or not
3 Ms. Fontana had emphysema or COPD, and we
4 respectfully submit that we're entitled to a
5 directed verdict on the issue of emphysema,
6 COPD, as it relates to Ms. Fontana.

7 THE COURT: All right. Thank you.

8 MR. CHUMBLEY: Thank you.

9 Excuse me. Before Mr. Hunter gets up,
10 Mr. Upshaw has another issue that he wants to
11 bring up for a directed verdict, Your Honor.

12 THE COURT: Okay.

13 MR. UPSHAW: Your Honor, it's up to you.
14 I don't know whether you want Mr. Hunter to
15 respond to those.

16 THE COURT: No. Go ahead. We'll take all
17 of your side at one time.

18 MR. UPSHAW: All right, Judge.

19 This will explain -- may I approach?

20 THE COURT: Yes, sir.

21 MR. UPSHAW: Your Honor, the motion I've
22 handed you is a motion for directed verdict on
23 behalf of Brown & Williamson, but it does
24 apply, as we have found out at the close of the
25 plaintiff's case, to all of the defendants, and

1 we would -- I think all of the defendants will
2 adopt -- if you want them all to state that
3 they adopt this motion, they will, but I am
4 presenting this motion on behalf of all of the
5 defendants and not just Brown & Williamson at
6 this point.

7 Your Honor, the motion I intend to present
8 to you and the issue I intend to present to you
9 will basically end this case, and the reason it
10 ends this case is very clear. Plaintiff has
11 failed to present any evidence that any of the
12 defendants specifically caused her injuries or
13 aggravated any existing injury through her
14 exposure to one of the defendant's or any of
15 the defendants' products.

16 This is a fundamental issue --

17 THE COURT: How many times did we have
18 stewardesses testify that the airlines, in
19 fact, supplied products from all American
20 tobacco companies?

21 MR. UPSHAW: Their testimony is not from
22 all American tobacco companies, Your Honor.

23 THE COURT: Well --

24 MR. UPSHAW: Their testimony was very
25 specifically -- and I'll review that testimony

1 you'd like.

2 You bring up a point. You've allowed
3 flight attendants to testify in this case.
4 Only one of those flight attendants was asked
5 what brands she saw, and she named several
6 brands on her flights.

7 Ms. Fontana, whose case we are in right
8 now -- and you remember, many of the flight
9 attendants, if not all of the flight
10 attendants -- well, actually not all of them, a
11 couple at the end, have their own cases.

12 THE COURT: Can the Court take judicial
13 notice of the fact that in a 747 plane, the
14 likes of which Ms. Fontana flew, the Court has
15 flown, and I assume everybody who's old enough
16 to have flown one, has flown in it, flew in it
17 when it was smoking, so you had every single
18 form of American and probably foreign tobacco
19 things smoked in those planes? I mean --

20 MR. UPSHAW: I don't believe so, and I'll
21 answer the Court's question.

22 THE COURT: Because I'm going to take
23 judicial notice of what I know, because I
24 smoked a whole lot of those cigarettes every --
25 I think -- you name a company, I've smoked

1 their cigarettes --

2 MR. UPSHAW: The whole point is, Your
3 Honor, very simply --

4 THE COURT: -- on a plane.

5 MR. UPSHAW: That may be true. That may
6 be exactly true, but in a court, Judge, you
7 cannot take judicial notice of that. Marie
8 Fontana, the plaintiff, in this case, did not
9 identify one of the manufacturers of the
10 products she's claiming caused her injuries.
11 That's basic, elemental product liability law,
12 and it goes directly not only -- not only
13 because it goes to liability, it goes to
14 causation.

15 Your Honor, I see you're smiling, but it's
16 so fundamental, I think you think: Well,
17 everybody would know that, and you're right.

18 In any other case, in any other case that
19 was brought before you, you would say, how come
20 nobody identified that this product -- that the
21 plaintiff was injured by that particular
22 product? How can you take judicial notice if,
23 using your tire example that you gave me
24 earlier, how can you take judicial notice that
25 it was a Firestone tire, unless somebody said

1 it was Firestone?

2 THE COURT: And what role do you think the
3 settlement plays in all of this?

4 MR. UPSHAW: The settlement is clear, and
5 that's on Page 3 of our motion, and I
6 understand the Court needs some time to review
7 this.

8 The settlement agreement itself does not
9 say that the burden is shifted or that the
10 plaintiffs do not have to prove that one of the
11 settling defendants, if not all of the settling
12 defendants, caused her particular injury.

13 And I cite to you Paragraph 12 of the
14 settlement agreement, which deals with the
15 burden shift, and that's the issue -- and
16 that's the place where that issue would have
17 been brought up.

18 It was not a bargained-for portion of the
19 settlement agreement that the plaintiffs were
20 not required to identify who manufactured the
21 cigarettes on their planes, on the planes that
22 they flew on.

23 Now, they could have done it very easily.
24 In fact, they knew they needed to do it,
25 because in that deposition they asked her that

1 question.

2 "Ms. Fontana, do you remember which brands
3 were on your flights?"

4 She said, "Yes, I remember this brand,"
5 and she stated several brands. But they didn't
6 ask her in trial.

7 They even asked one of the other flight
8 attendants: "Do you remember what was on your
9 flights?"

10 THE COURT: Mr. Upshaw, let me just
11 shorten this up a little bit. This may be a
12 good point on appeal, but it's not going far by
13 me.

14 MR. UPSHAW: All right, Your Honor.

15 THE COURT: As far as the other motion is
16 concerned, Mr. Hunter?

17 MR. HUNTER: May it please the Court. As
18 I was just handed the written motion today, I
19 went through it, and the first thing that
20 strikes me is that they break this down as
21 though they have the right, and the Court needs
22 to make a determination as to what specific
23 diseases that I've proved is similar to if it
24 was an auto accident, and I was complaining
25 that the plaintiff had a low back injury and a

1 herniated disk and a radiating injury down the
2 lumbar L5-S1 nerve root, nobody would come
3 before the Court and say, "Well, he hasn't
4 proved that the herniation was a true
5 herniation. He's only argued that it was a
6 bulging disk," and then he hasn't proved the
7 low back pain or he hasn't proved the headaches
8 or he hasn't proved the -- any particular
9 disease element that I was claiming. And
10 that's really the approach that they take here
11 in this case.

12 For instance, they start out with chronic
13 sinusitis. And Mr. Chumbley tells the Court,
14 as though he's a medical authority, that
15 post-nasal drip is not chronic sinusitis, and
16 he says that as though that's a given.

17 There's nothing in this record to indicate
18 that, in fact, post-nasal drip is chronic
19 sinusitis, and this lady has had post-nasal
20 drip from the medical records from the early
21 '80s until today.

22 He then talks about COPD, and he suggests
23 to the Court that there's only one record of
24 COPD, and, therefore, he's entitled to a
25 directed verdict, as though that was not enough

1 in the records.

2 I mean, all his arguments essentially go
3 to the weight that the jury would give any
4 particular disease entity.

5 There certainly is direct evidence from
6 both Dr. Foley and Dr. Irvin that the plaintiff
7 suffers COPD and emphysema, and that those are
8 particularly and directly, in this case,
9 related to smoking.

10 Another interesting thing is that he would
11 suggest to you that there's no evidence of
12 chronic bronchitis, and Dr. Foley said -- and
13 I'm getting very specific here, because this is
14 clearly in the record, chronic bronchitis, but
15 Dr. Foley said --

16 MR. GERAGHTY: What page are you on?

17 MR. HUNTER: Page 653, and he's talking
18 about the peribronchial thickening, which is
19 something also Dr. Koenigsberg says the X-ray
20 shows.

21 And he says, "We see a soft tissue
22 thickness surrounding the bronchus and just
23 like -- peribronchial thickening, the reason I
24 bring it out, is because when you inhale
25 something into your lungs that is irritating to

1 your lungs, the response of the mucosa that
2 lines the bronchi is to become inflamed, and if
3 it gets irritated, it would be called a
4 condition called acute inflammation, or the
5 medical term would be acute bronchitis.

6 "It means that the bronchi are inflamed,
7 and "itis" means inflammation. If that becomes
8 persistent, day after day, week after week,
9 month after month, it's no longer acute; it's
10 chronic, meaning long-standing.

11 "Question: How about year after year?

12 "Answer: And if you take that further, if
13 you go year after year, that chronic
14 inflammation, soft-tissue thickening" -- and I
15 went through these from 1987, when it was a
16 relatively benign disease that was hardly
17 appreciable on the X-ray film, all of the way
18 to the most recent CT scan at Jackson Memorial
19 Hospital, where the intralobular emphysema was
20 marked, the peribronchial thickening was
21 gradually increasing.

22 I mean, to suggest to the Court that I
23 haven't proved that there's any chronic
24 bronchitis in this patient is just -- is just a
25 failure to listen to the evidence.

1 Now, aggravation of sarcoidosis, I do want
2 to comment on. I presented direct testimony of
3 Dr. Irvin on COPD, emphysema and chronic
4 bronchitis. It was the defendants on cross
5 examination that opened the door to Dr. Irvin's
6 opinion that, in fact, the underlying condition
7 of sarcoidosis was aggravated by the exposure
8 to environmental tobacco smoke, and that was
9 when I had to get up on redirect to go through
10 the jury -- to go through with the jury that it
11 was the defendants that introduced evidence
12 that the underlying condition of sarcoidosis
13 was hastened.

14 And you remember, I forget exactly where I
15 had that, but you'll remember I had to read
16 from his deposition where he said that it was
17 his opinion within a reasonable degree of
18 scientific probability that the progression of
19 the disease was hastened, I believe was his
20 testimony, but the defendants went into that on
21 cross examination, and now they can't complain
22 about it by saying, "Well, we don't think he
23 was qualified to give those opinions," because
24 they were the ones that elicited that from him.

25 But in that discussion with the defendants

1 on cross, he goes: "Question: It's so
2 persistent, meaning the sarcoidosis, that she
3 requires a lung transplant, correct?

4 "Answer: That I would disagree with. I
5 believe the reason that she is now awaiting a
6 transplant is, in part, due to the sarcoidosis,
7 and, in fact, due to the other changes in her
8 lung."

9 So there certainly is evidence, both from
10 Dr. Foley and Dr. Irvin, that the aggravation
11 of her underlying condition or the aggravation
12 of her existing condition was the cause of the
13 severe and tremendously devastated condition of
14 her overall ability to breathe.

15 But, again, as reading through the motion
16 for directed verdict, it's argumentative,
17 pertaining to the definitions. And I've just
18 cited a couple of areas here for the Court
19 where they make arguments that clearly go to
20 the weight.

21 The American Thoracic Society, which
22 Dr. Foley is a member, defines chronic
23 bronchitis as the presence of a chronic cough
24 for three months in each of two consecutive
25 years.

1 Now, there is no definition of chronic
2 bronchitis or chronic sinusitis in the
3 settlement agreement. There's no definition of
4 COPD. There's no definition of any of those
5 diseases.

6 Chronic bronchitis, based on the testimony
7 in this case, is "itis" is inflammation, and
8 "bronchi" refers to the bronchi, which is the
9 respiratory tree, and "chronic" means
10 long-standing.

11 So they can't force me to abide by what
12 they consider to be the definition, which is
13 the American Thoracic Society, which defines
14 chronic bronchitis as the presence of a chronic
15 cough for three months.

16 There is no definition of that term in the
17 settlement agreement; so, therefore, the jury,
18 when determining whether they find she's got
19 chronic bronchitis, is to use their common
20 sense, as they understand it from the medical
21 testimony that they heard, and that medical
22 testimony was that she has all of these chronic
23 obstructive diseases, which run the gamut from
24 chronic obstructive pulmonary disease to
25 chronic bronchitis to emphysema.

1 And, again, there is no definition of
2 COPD. That is a term which is a catch-all
3 term. It's very broadly based. It relates to
4 any obstructive disease of the lung. And so
5 for all of those disease processes, including
6 chronic sinusitis, which I admit that I did not
7 make a focal point of my presentation to the
8 jury, but it is in the medical records that
9 she's been suffering from post-nasal drip,
10 which lead to sinus surgery in the year of
11 1990, and that's the only medical record that
12 we don't have because that was destroyed. They
13 only maintain their records in that facility
14 for ten years.

15 But the defendants' motion should be
16 denied, and we ask the Court to deny the
17 motion.

18 THE COURT: Okay. I think that there's
19 enough testimony to get past a directed
20 verdict.

21 MR. CHUMBLEY: Your Honor, can I?

22 THE COURT: I'm sorry. Go ahead. I
23 didn't realize.

24 MR. CHUMBLEY: I just want to respond to a
25 couple of things.

1 THE COURT: Certainly.

2 MR. CHUMBLEY: There's been no evidence
3 that it caused her sarcoid. I mean, he's been
4 playing with this --

5 THE COURT: Why, if you have an
6 aggravation of a preexisting condition, why do
7 you have to have evidence that it caused
8 sarcoidosis?

9 MR. CHUMBLEY: Because that's in the
10 complaint, Your Honor. That's why. It's in
11 the complaint, and we're entitled to a directed
12 verdict as to that claim.

13 Also with respect to chronic sinusitis,
14 this is the extent of the testimony in the
15 record on chronic sinusitis, other than
16 Mr. Hunter's opening, Page 919, Dr. Irvin,
17 who's not a doctor --

18 THE COURT: Well, he is --

19 MR. CHUMBLEY: There are reports in the
20 record about post-nasal drip.

21 That's it. That is the only testimony
22 anywhere in this record that even approaches
23 the idea of chronic sinusitis. And post-nasal
24 drip is a symptom; it is not chronic sinusitis.
25 Chronic sinusitis is a medical condition.

1 That is the extent of Dr. Irvin's
2 discussion of post-nasal drip, what I just read
3 you.

4 There is no evidence in this record that
5 Ms. Fontana has ever had chronic sinusitis, and
6 we're entitled to a directed verdict on that.

7 With regard to chronic bronchitis,
8 Mr. Hunter read to you from Page 653. I think
9 that's in the volume that I gave Your Honor up
10 there, Volume 6. That is what I was referring
11 to when Dr. Foley gave a description of chronic
12 bronchitis, but nowhere in that passage that
13 Mr. Hunter read to you on Page 656 does he say
14 that Ms. Fontana had chronic bronchitis.

15 In addition, going back just for a second,
16 and then I'll sit down, on the chronic
17 sinusitis claim, Mr. Hunter just got up and
18 told Your Honor that Dr. Irvin was his witness
19 on COPD, emphysema and chronic bronchitis.

20 Now all of the sudden he wants to make
21 Dr. Irvin, the physiologist, his expert on
22 chronic sinusitis because he mentioned
23 post-nasal drip once in his testimony.

24 There is just nothing in this record, and
25 Mr. Hunter got up in opening and said, "She's

1 got chronic sinusitis, and I'm going to link it
2 up." And he never did. He never established
3 that she had it, and even if she had it, he
4 never established that she had it because of
5 her exposure to environmental tobacco smoke on
6 an aircraft cabin.

7 And at the very least, Your Honor, I
8 believe we're entitled to a directed verdict on
9 whether or not environmental tobacco smoke
10 caused her underlying condition of sarcoid, and
11 on the chronic sinusitis claim, and on the
12 other claims, too, for the reasons previously
13 stated. Thank you.

14 THE COURT: I don't think I have any need
15 to go down through each individual one. I'm
16 just going to deny the motion.

17 MR. HUNTER: Judge, I just would like to
18 bring to your attention that Mr. Chumbley says
19 it's in the complaint, it's in the complaint
20 about the sarcoidosis, and it's not. It's
21 chronic obstructive pulmonary disease with
22 substantial lung capacity reduction, chronic
23 sinusitis, bleeding in her lungs and serious
24 respiratory ailments.

25 MR. CHUMBLEY: Substantial lung capacity

1 reduction is the sarcoidosis. That's the
2 restrictive disease.

3 MR. HUNTER: You told the Judge
4 sarcoidosis was in there and I pled it, and
5 that's --

6 THE COURT: Well, my ruling stands. I
7 deny the motion.

8 We'll start up the defense case at 10:00.

9 MR. GERAGHTY: Off the record earlier,
10 shortly after the lunch break, I told
11 Mr. McCarron, and I just want to, for the
12 record, indicate what I told Mr. McCarron, and
13 that's that we also disclose Dr. Ingram, and
14 with Dr. Ingram, we may use any and all medical
15 records of Marie Fontana, any X-rays, CT scans,
16 any other radiographic information, and we also
17 have a diagram of the lung or a model of a lung
18 that we may use with him.

19 MR. MCCARRON: (Indicating.)

20 (Court was adjourned at 4:45 p.m.)

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